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1927.

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1926
Nov. 3.

MARSDEN *v.* EDWARD HEYES, LIMITED.

[1925. M. 4971.]

Landlord and Tenant—Yearly Tenancy—Alteration of Premises—Waste—Implied Obligations—To use in tenantlike Manner—To yield up Premises—Continuing Obligations—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16).

A tenant from year to year is under an implied obligation to use the demised premises in a tenantlike manner and to yield them up so used at the end of the tenancy. The obligation continues as long as he continues tenant. If he alters the character of the premises he commits a breach of the obligation and is liable in damages for the injury to the reversion.

In 1914 the plaintiff became the owner of the reversion in certain premises consisting of a dwelling-house and shop let to the defendants on an oral tenancy from year to year. In the same year the defendants removed a partition wall, staircase and fireplaces, and converted the

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premises into one large shop. In 1923 they assigned their tenancy to third persons. In 1925 the plaintiff brought an action against the defendants for waste and for breach of obligations which, as she contended, were implied by law to use the premises in a tenantlike and proper manner, and having so used them to yield them up at the end of the term. The defendants pleaded the Statute of Limitations :—

Held, that the defendants were under an implied obligation to use the premises in a tenantlike manner ; that they had committed a breach of this obligation ; that the breach was continuing in 1923, and that the plaintiff was entitled to damages for injury to the reversion.

APPEAL from the judgment of Mr. Commissioner Courthope Wilson K.C. in an action tried at Manchester Assizes on May 11, 1926, before the learned Commissioner without a jury.

By an oral agreement made on or about July 12, 1895, between one William Henry Marsden, then the husband of the plaintiff, but since deceased, and the defendant company, the company became tenants to the said William Henry Marsden of a shop and dwelling-house, No. 179 Derby Street, Bolton, in the county of Lancaster, at a rent of 26*l.* a year, payable quarterly. The demised premises then consisted of a shop facing the street and a kitchen separated from the shop by a partition wall. The shop and kitchen had each a fireplace. These were on the ground floor. On the first floor were a front bedroom and a back bedroom separated by a partition wall, which was a continuation of the wall separating the shop from the kitchen. Each bedroom had a fireplace. There was a staircase from the ground floor to the first floor.

On January 14, 1914, W. H. Marsden died, leaving all his property to his widow, the plaintiff. The defendants remained tenants of the demised premises until June 25, 1923.

The plaintiff alleged that it was an implied term of the agreement of tenancy that the defendants should during the tenancy use the premises in a tenantlike and proper manner, and should keep them in repair and deliver them up with all the fixtures therein in the same state and condition as they were in at the commencement of the tenancy, reasonable wear and tear only excepted ; but that they had used them in an untenantlike and improper way and had

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failed to keep them in repair and to deliver them up in the same condition as they were in at the commencement of the tenancy, reasonable wear and tear excepted; and had committed waste in pulling down and removing walls, doors, windows and fixtures, and carrying them away and disposing of them to their own use.

It was proved at the trial that some time in 1914 the defendants had taken down and removed the partition wall between the front and back rooms on both floors, all the fireplaces, the staircase and the windows and doors at the back of the premises, and had turned the ground floor into one large shop and the first floor into a loft approached by a ladder in place of the staircase. In the words of the learned Commissioner's judgment: "The evidence shows that the premises have been gutted by the defendants and there is nothing left except the four walls of the building. All the internal fixtures and fittings and some of the walls and grates, and so on, have all been removed."

On June 25, 1923, the defendants sold their undertaking and assets to George G. Mason & Co., Ld., and assigned their tenancy of the premises to that company, who thereupon entered into and remained in possession of the premises and carried on business there until May, 1925.

The defendants contended that if they had committed any waste, which they denied, it was committed more than six years before September 25, 1925, the date of the writ, and was barred by the Limitation Act, 1623; and that it was of an ameliorative character and improved the value of the premises, regard being had to their nature and user or probable user and the purpose for which they were let.

The learned Commissioner held that the acts of the defendants, whether acts of waste or breaches of an implied obligation with regard to the user of the demised premises, were all committed in the year 1914, and that any relief in respect of them was barred by the Limitation Act, 1623. He further held that the only implied obligation upon a tenant from year to year under a parol agreement was to keep the demised premises wind and water-tight and that there was no evidence of any breach of this obligation. He therefore gave judgment for the defendants.

The plaintiff appealed.

Cyril Atkinson K.C. and *T. T. Russell* for the appellant. The learned Commissioner has unduly limited the implied obligation upon a tenant from year to year in relation to the demised premises. In ordinary circumstances an agreement is implied on the part of such a tenant to use the premises in a tenantlike manner: *Ferguson* v. *Anon.* (1); *Horsefall* v. *Mather* (2); Foà, Landlord and Tenant, 6th ed. (1924), p. 325; and on the expiration or sooner determination of his tenancy deliver up to his landlord the peaceable and quiet possession of the premises and every part thereof, together with all erections, buildings, improvements, and fixtures which he is not entitled to remove: Woodfall, Landlord and Tenant, 21st ed. (1924), p. 909. This is a continuing liability: *Doe* v. *Jackson.* (3)

[SCRUTTON L.J. referred to *Henderson* v. *Squire.* (4)]

It follows that in 1923, when the defendants assigned their tenancy, they were under a liability for breach of the agreement to use the premises properly; for it cannot be denied that their acts in relation to them were a breach of the agreement. In the circumstances the parties have agreed that the cost of the repairs, 215*l.* 6*s.* 7*d.*, is the fair measure of damages if the defendants are liable.

Archer K.C. (*Laski* with him) for the respondents. There was no waste here. The premises as shop premises, which was their main use, are greatly increased in value by the defendants' alterations.

[BANKES L.J. The Court is unanimously of opinion that voluntary waste has been committed.]

A tenant from year to year is not liable for permissive waste: *Martin* v. *Gilham.* (5) He is no doubt liable for voluntary waste, but then he is only liable in tort. A

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(1) (1797) 2 Esp. 590.

(2) (1815) Holt, N. P. 7.

(3) (1817) 2 Stark. 293.

(4) (1869) L. R. 4 Q. B. 170.

(5) (1837) 7 Ad. & E. 540.

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covenant not to commit waste will not be implied: Foà, Landlord and Tenant, 6th ed., p. 326, citing *Defries* v. *Milne* (1), where a dictum of Lord Esher M.R. to the contrary in *Whitham* v. *Kershaw* (2) was disapproved. The tortious acts were all committed in 1914, more than six years before the writ was issued. The implied agreement to yield up possession is one of the class of covenants for title. It obliges the tenant to give back the whole interest in the premises, but does not relate to their physical condition.

Counsel for the appellant were not called upon in reply.

BANKES L.J. [after stating the facts:] I take the evidence as establishing that the defendants have completely altered the character of the demised premises. This was done more than six years before the action was brought and while the defendants' tenancy was continuing.

When the tests laid down in *West Ham Central Charity Board* v. *East London Waterworks Co.* (3) and *Hyman* v. *Rose* (4) are applied it is clear that this was voluntary waste. I would cite the words of Lord Loreburn in the House of Lords suggesting as a matter to be considered the question whether what has been done is inconsistent with the terms of the letting. He says (5): "It is a question of fact whether such an act changes the nature of the thing demised, and regard must be had to the user of the demised premises which is permissible under the lease." In the Court below two points were taken: first, that the plaintiff had no vested interest in the reversion in the premises at the time when the acts of waste were committed. That point is not insisted on here. Secondly, that the waste, assuming it to have been wrongful, was committed more than six years before action brought. To this contention Mr. Atkinson answers that it is not conclusive, if sound; because apart from any tort the law recognizes a contractual obligation

(1) [1913] 1 Ch. 98.
(2) (1885) 16 Q. B. D. 613, 616.
(3) [1900] 1 Ch. 624.
(4) [1912] A. C. 623.
(5) [1912] A. C. 632.

upon the defendants as tenants towards their landlord in reference to the user to which the premises were to be put and the extent to which they were to be maintained and repaired. It is not necessary to define the extent of the obligation. It is enough to say that the facts of this case lead to the clear conclusion that there was a breach of that obligation. In *Horsefall* v. *Mather* (1) in an action of assumpsit against a tenant at will of a dwelling-house Gibbs C.J. held that the defendant was not bound to repair generally, but said: "He is bound to use the premises in a husbandlike manner; the law implies this duty and no more." In *Ferguson* v. *Anon.* (2) Lord Kenyon said: "A tenant from year to year is bound to commit no waste, and to make fair and tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises"; indicating thereby that if a tenant commits waste he must do such repairs to the premises as will enable them to exclude wind and water. It may be that he must restore them to the state they would be in if he had committed no waste, or deliver up premises as they were demised to him, fair wear and tear excepted. But at any rate he must deliver up premises of the same character as those which were demised to him; for example, a tenant who takes a dwelling-house cannot at the end of the tenancy yield up a storehouse, or a stable, or cowhouse, however elaborately constructed. But it is not necessary further to define the obligation, because it cannot be contended that a tenant from year to year, who completely alters the premises, does not commit a breach of his implied obligation in respect of the premises. Mr. Archer properly admitted that if there was a continuing breach the Statute of Limitations would not assist the defendants. It follows that on June 25, 1923, the plaintiff had a cause of action for damages. The parties have agreed that the cost of repairs is the measure of the damages. The appeal will therefore be allowed and judgment will be entered for the plaintiff for 215*l.* 6*s.* 7*d.*

(1) Holt, N. P. 7.

(2) 2 Esp. 590.

SCRUTTON L.J. I am of the same opinion. The defendants became tenants of premises, which included a dwelling-house. They have made alterations in the premises to such an extent that there is no longer any dwelling-house. That is voluntary waste. The defendants say that waste committed is committed once for all, and that as the writ was issued more than six years after it was committed the plaintiff cannot sue for it. That argument overlooks their implied obligation as tenants to deliver up the demised premises. In my opinion there is an implied contract by a tenant to use the premises in a tenantlike manner and to deliver them up at the end of the term unless prevented from so doing by the act of God. To use premises in a tenantlike manner means at any rate that a tenant will not make such structural alterations in the premises as will change their character. If a dwelling-house is let and something which is not a dwelling-house is delivered up, the contract to deliver up in a tenantlike condition is broken. *Henderson* v. *Squire* (1) decides that the contract is not merely in the nature of a covenant for title. It imposes an obligation to deliver up possession of the entire premises at the end of the term, and has relation to their physical condition. Mr. Archer contended that as it was merely an implied and not an express contract, and there was a subsequent assignment and a recognition of the assignee as tenant by the landlord, the implied obligation ceased; but that point was not taken in the Court below, and we cannot consider it here. The case was argued on the footing that all the acts of waste were done before the assignment took place. The parties agreed that 215*l.* 6*s.* 7*d.*, which is all that is necessary in order to put the premises in proper order, should be taken as the amount of damages, assuming the defendants were liable. In the result there must be judgment for the plaintiff for the agreed amount.

ATKIN L.J. I agree. I do not think this is a case in which the plaintiff's only remedy is by way of an action for waste. It may be that voluntary waste is the subject-matter

(1) L. R. 4 Q. B. 170.

of an action of tort (1), but no doubt the tenant would also be liable upon an obligation express or implied in the contract of tenancy. The contract of tenancy in the present case was oral, and contained no express obligation on the part of the tenants relating to their user of the premises, and so the question is whether there is an implied term in an oral agreement for a yearly tenancy that the tenant will abstain from such acts as the defendants have committed in this case. The precise obligation of such a tenant in relation to the premises has been the subject of discussion for over a century, and I am not sure that the obligation can be satisfactorily defined, for it must depend upon the relation between the parties, the character and state of the demised premises, and other varying circumstances. But the cases cited from Espinasse and Holt's Nisi Prius Reports, at least 110 years old, show that there is an obligation upon the tenant to use the premises in a tenantlike or, which is the same thing, a husbandlike manner. It follows that he is under a continuing obligation to repair acts which would amount to voluntary waste and which involve a breach of the obligation to use the premises in a husbandlike manner. It is clear that these tenants, by entirely altering the character of the premises, did acts amounting to voluntary waste and to a breach of this obligation. The result is that in 1923 they were in default as regards that continuing obligation, which involved an obligation to make good the breach. That is all we need decide in this case. Mr. Archer argued that this obligation in regard to the character of the premises, if it existed, was not broken by the defendants, because in 1923 it passed to their assignees. I do not decide whether the obligation passed to the assignees, or whether if it did it so passed as to absolve the defendants or to leave them still liable, because that point was not taken in the Court below. Apart from those questions the breach of the defendants' obligation is sufficient to support the plaintiff's claim. In other circumstances the measure of damages might have to be considered, because they are damages to the reversion, and we do not know what they are; but in the present case the parties have agreed, reasonably considering that the tenancy is from year to year, that if the defendants should be held liable the cost of necessary repairs should represent the damages. There will therefore be judgment for the plaintiff for that amount.

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(1) See *Defries* v. *Milne* [1913] 1 Ch. 98.

Appeal allowed.

Solicitors for appellant: *Woodcock, Ryland & Parker, for Russell & Russell, Bolton.*

Solicitors for respondents: *H. Isaacs, Lewis & Co., for F. O. S. Leak & Co., Manchester.*

W. H. G.

Considered. GREENHALGH v. ARDERNE CINEMAS LD. [1951] 1 Ch. 286

[IN THE COURT OF APPEAL.]

C. A.
1926
Nov. 9.

SHUTTLEWORTH *v.* COX BROTHERS AND COMPANY (MAIDENHEAD), LIMITED, AND OTHERS.

[1924. S. 3769.]

Company—Articles—Alteration—Validity—Contract—Permanent Director—"Bona fide for benefit of company"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 13.

By s. 13, sub-s. 1, of the Companies (Consolidation) Act, 1908, a company may, subject to the provisions of the Act and to the conditions contained in the memorandum, by special resolution alter or add to its articles. By the general law this power must be exercised bona fide for the benefit of the company:—

Held, that it is for the shareholders, and not for the Court, to say whether an alteration of the articles is for the benefit of the company, provided that it is not of such a character as that no reasonable men could so regard it.

Dictum of Peterson J. in *Dafen Tinplate Co.* v. *Llanelly Steel Co.* [1920] 2 Ch. 124, 140 disapproved.

The articles of association of a company provided that the plaintiff and four others should be the first directors of the company, and that they should be permanent directors, and that each of them should be entitled to hold office so long as he should live unless he should become disqualified from any one of six specified events. Owing to irregularities in the accounts furnished by the plaintiff of sums received by him on the company's account an extraordinary general meeting of the company was held and a special resolution was passed that the articles should be

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altered by adding a seventh event disqualifying a director—namely, a request in writing by all his co-directors that he should resign his office. Such a request was subsequently made to the plaintiff. There was no evidence of bad faith on the part of the shareholders.

In an action by the plaintiff for breach of an alleged contract contained in the original articles that he should be a permanent director, and for a declaration that he was still a director of the company:—

Held, that the contract, if any, between the plaintiff and the company contained in the articles in their original form was subject to the statutory power of alteration and that if the alteration was bona fide for the benefit of the company it was valid and there was no breach of that contract; that there was no ground for saying that the alteration could not reasonably be considered for the benefit of the company; that, therefore, there being no evidence of bad faith, there was no ground for questioning the decision of the shareholders that the alteration was for the benefit of the company; and, consequently, that the plaintiff was not entitled to the relief claimed.

APPEAL from the judgment of Avory J. in an action tried at Reading before the learned judge and a common jury.

The plaintiff, who had been works manager and a director of the defendant company, claimed damages for having been dismissed from his office of manager and wrongfully excluded from his position as director and for a declaration that he was still entitled to be a director in the circumstances hereafter mentioned.

The defendant company was incorporated on May 21, 1921, to acquire and take over as going concerns and carry on the business of English and foreign timber merchants and builders' merchants then carried on by John Beare, Ernest Burton Norris and John Edward Shuttleworth (the plaintiff), under the style of Cox Brothers & Co. The capital of the company was 25,000*l.* divided into 25,000 shares of 1*l.* each. The greater number of these shares was held by the directors. By No. 1 of the articles of association the Regulations in Table A contained in Sch. I. to the Companies (Consolidation) Act, 1908, were to apply, except those numbered 2, 5, 35 to 40, 46, 47, 68, 69, 70, 73, 77, 84, 85, 98, 111 and 114.

By No. 17 of the articles the number of the directors was to be not less than three nor more than seven. By No. 18 the following persons were to be the first directors of the company: John Beare, Ernest Burton Norris, John Edward Shuttleworth (the plaintiff), Thomas Norris and Harry Legassicke Fritche. The article proceeded: "They shall be permanent directors of the company, and each of them shall be entitled to hold such office so long as he shall live unless he shall become disqualified from any of the causes specified in article 22 hereof; and accordingly clauses 78 to 83 and clause 86 of Table A shall not apply to any permanent director."

By No. 22 of the articles: "The office of a director shall be vacated:—

(*a*) If he become bankrupt or insolvent or compound with his creditors;

(*b*) if he become of unsound mind or be found a lunatic;

(*c*) if he be convicted of an indictable offence;

(*d*) if he cease to hold the necessary share qualification or do not obtain the same within one month from the date of his appointment;

(*e*) if he absent himself from the meetings of directors for a period of six calendar months without special leave of absence from the other directors;

(*f*) if he give the directors one calendar month's notice in writing that he resigns his office."

In June, 1921, the plaintiff was appointed the works manager of the business carried on by the company at a salary of 420*l.* a year. Subsequently by a resolution his appointment was made terminable on three months' notice.

As yard manager it was the plaintiff's duty to keep a credit sales book and a cash sales book and to hand over to the company at the end of the week all sums received by him. Between November 21, 1923, and July 4, 1924, he received twenty-two payments varying between 13*l.* and 5*s.* 10*d.*, and amounting to 76*l.* 9*s.* 1*d.*, but made no entries of these payments in the cash book, and had not at the date of the writ duly accounted for them. On August 22, 1924, at a meeting of the directors the plaintiff was summarily dismissed from the position of works manager. At an adjourned meeting held on or about August 29 he was asked to resign his office of director, but he refused to do this.

On September 9, 1924, the plaintiff issued the writ in this action against the company and J. Beare, E. B. Norris, T. Norris and H. L. Fritche, claiming an injunction restraining the defendants from dismissing or excluding him from his offices of director and works manager of the company. On September 10 he applied for an injunction restraining the defendants from dismissing or excluding him from those offices. Branson J., the judge in chambers, dismissed the application, and this decision was afterwards affirmed by the Court of Appeal on December 11, 1924.

On October 24, 1924, at a meeting of the directors of the company the defendant, T. Norris, the chairman of the company, proposed, and the defendant, H. L. Fritche, a director, seconded a resolution, which was carried, that an extraordinary general meeting should be called for the purpose of considering and, if thought fit, of passing the following resolution: "That the following paragraph be added to article 22 of the articles of association of the company after paragraph (*f*) of the said article—'(*g*) If he be requested in writing by all the other directors to resign his office.'" On October 25 the plaintiff received a notice signed by the defendant J. Beare, the secretary and a director of the company, convening a general meeting of the shareholders to be held on November 7 for the purpose of considering the above resolution. The proposed meeting was not held on account of the interlocutory proceedings mentioned above.

By his statement of claim, which was delivered on November 6 and redelivered as amended on November 27, the plaintiff in addition to the injunction claimed by the writ prayed a declaration that he was a permanent director of the company and an injunction restraining the defendants from summoning and holding any meeting of the company for the purpose of passing a special resolution altering the articles of association of the company so as to enable the defendants to exclude the plaintiff from the office of director otherwise than in accordance with the articles of association.

He also claimed damages for wrongful dismissal from the post of works manager.

On February 3, 1925, notice was given to the members of the company that an extraordinary general meeting would be held on February 13, 1925, for the purpose of considering, and if thought fit, of passing the resolution mentioned in the notice of October 24, 1924. This resolution was carried by the requisite majority of shareholders at a meeting duly held on February 13, and, after due notice had been given, was confirmed at a meeting held on March 5.

The defence to the action was delivered on March 31, 1925. By it the defendants pleaded that they were justified in dismissing the plaintiff from the post of works manager; and, as to the claims for a declaration and injunction, that in accordance with s. 13 of the Companies (Consolidation) Act, 1908 (1), they had on March 5, 1925, as they were lawfully entitled to do, altered art. 22 of the articles of association by adding thereto para. (*g*), and that the alteration was bona fide and for the benefit of the defendants as a whole. They counterclaimed the sum of 76*l*. 9*s*. 1*d*., which the plaintiff had not accounted for, and a further sum of 44*l*. 14*s*. 4*d*. for goods sold and delivered.

On February 6, 1926, the plaintiff was requested in writing by all the other directors of the company to resign his office of director.

The learned judge at the trial, after summing up, asked the jury two questions, which, with the answers of the jury, were as follows:—

1. Was the conduct of the plaintiff such as to justify his dismissal without notice? No.

2. Was the alteration in the articles of association made in good faith for the benefit of the company? (*a*) No. (*b*) Incidentally, Yes.

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(1) Companies (Consolidation) Act, 1908, s. 13, sub-s. 1: "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution."

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Upon the first finding judgment was entered for the plaintiff against the company for an agreed sum of 105*l.* The defendants appealed from that judgment, and this Court on November 5, 1926, dismissed the appeal, being of opinion that there were grounds to support the verdict. Upon the second finding the learned judge at the trial held that there was no evidence on which the jury could find that the alteration in the articles was not bona fide, and gave judgment for the defendants.

The plaintiff appealed from this judgment.

Porter K.C. and *H. McKenna* for the appellant. Art. 22 in its original form constituted a contract between the company and the plaintiff that he should be a director for life provided he did not become disqualified for any of the six causes mentioned in that article. A company cannot break its contracts by altering its articles: *Allen* v. *Gold Reefs of West Africa, Ld.* (1), per Lindley M.R.; *British Murac Syndicate* v. *Alperton Rubber Co.* (2)

Secondly, although s. 13 of the Companies (Consolidation) Act, 1908, gives power in general terms to alter the articles, this power has long been held to be subject to the condition that it be exercised "bona fide for the benefit of the company as a whole": *Allen* v. *Gold Reefs of West Africa, Ld.* (3) The alteration of art. 22, by adding the clause which enables four of the directors to expel the fifth by requesting him in writing to resign, is not bona fide for the benefit of the company as a whole, but is simply for the benefit of the four directors, and therefore invalid: *Brown* v. *British Abrasive Wheel Co.* (4) It is not enough for the respondents to say that the shareholders honestly believed they were acting for the benefit of the company. "It has been suggested," said Peterson J. in *Dafen Tinplate Co.* v. *Llanelly Steel Co.* (5), "that the only question in such a case as this is whether the shareholders bona fide or honestly believed that the alteration was for the benefit of the company. But this is not, in my view, the true meaning of the words of Lindley M.R. (1) or of the judgment in *Sidebottom's* case. (2) The question is whether in fact the alteration is genuinely for the benefit of the company." *Sidebottom* v. *Kershaw, Leese & Co.* (2) was a very different case from the present. There the only shareholders who were affected by the alteration of the articles were those who should be found acting against the interests of the company. If the alteration is invalid the appellant is entitled to the declaration and the injunction he claims and also to damages for infringement of his rights as a director.

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(1) [1900] 1 Ch. 656, 673.
(2) [1915] 2 Ch. 186, 193.
(3) [1900] 1 Ch. 656, 671.
(4) [1919] 1 Ch. 290.
(5) [1920] 2 Ch. 124, 140.

Vachell K.C. and *Earengey* for the respondents were not called on.

BANKES L.J. This is a cross-appeal by the plaintiff in an action brought by him to challenge the validity of a resolution of the shareholders in a company, the effect of which was to deprive him of his position as a permanent director of the company. The company was incorporated in 1921 to take over the business of timber and builders' merchants carried on at Maidenhead by the plaintiff, a Mr. Beare, and a Mr. E. B. Norris in partnership. [The Lord Justice then referred to arts. 17 and 18 of the articles of association of the company and proceeded:] It is not necessary to refer to art. 22 except to say that none of the causes therein mentioned had occurred and that there was no ground for removing the plaintiff under that article from the position of a permanent director of the company to which he was entitled under art. 18. Besides being a director he was appointed works manager at a salary, and so he remained without question or complaint for some three years. Then in 1924 and 1925 irregularities occurred in the accounts he furnished of cash received by him, as the result of which he was summarily dismissed from his position of works manager. He brought an action for wrongful dismissal. The defendants justified the dismissal on the ground not of dishonesty, but

(1) [1900] 1 Ch. 656.

(2) [1920] 1 Ch. 154.

of incompetence, on the part of the plaintiff. After a full hearing the jury found a verdict for the plaintiff. That verdict was challenged in this Court, and we decided that there was ground justifying the verdict.

At the trial the jury were also asked to consider the plaintiff's complaint that he had been wrongfully deprived of his position of permanent director. He contended that the alteration of art. 22 was invalid and that the amendment was not bona fide for the benefit of the company as a whole. He also contended that it amounted to a breach of a contract to be implied from the articles that he should be a permanent director of the company as long as he should live unless he became disqualified from any of the causes specified in art. 22 as it originally stood. In this case the contract, if any, derives its force and effect from the articles themselves, which may be altered. It is therefore not an absolute but a conditional contract; and the question of the plaintiff's rights under it depends, as do the other questions raised, upon whether the alteration of art. 22 was validly made.

The power to alter articles of association is conferred by s. 13 of the Companies (Consolidation) Act, 1908, which provides that, "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles." The memorandum of this company contains nothing in terms controlling the power conferred by that section of altering or adding to the articles; but it is well established that the Courts assert some control over the exercise of that power by a company, and the test applied by the Courts in deciding whether the power has been properly exercised was laid down by Lindley M.R. in *Allen* v. *Gold Reefs of West Africa, Ld.* (1), in these words: "The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 [of the

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(1) [1900] 1 Ch. 656, 671.

Companies Act, 1862] is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded." There is no question here of the formalities required by law. What is said is that this resolution is invalid because it is not bona fide for the benefit of the company as a whole. Now it happened that for some time no action was taken upon this resolution, but after some months had elapsed all the other directors decided that the plaintiff should resign his position as director. The plaintiff relies upon these facts as evidence that the resolution altering the articles was not bona fide, but that it was an act of vindictiveness on the part of the other directors, and afforded ground on which the jury might come to the conclusion that those directors were actuated by a wrong motive and therefore had not acted in good faith. Upon this point the jury were asked one question, whether the alteration in the articles of association was made in good faith for the benefit of the company. They answered that it was not made in good faith. Upon that a question arises whether there was evidence entitling them to come to that conclusion. Avory J., who tried the case, said in summing up that he was strongly of opinion that there was no evidence on which they could find want of good faith, but he left the question to them in case there might be an appeal if he decided there was no such evidence. After the verdict the learned judge ruled that there was no evidence to support the finding, and entered judgment for the defendants. That judgment is now challenged. We are unanimously of opinion that the ruling was right. It seems to me that these defendants were anxious throughout to take a charitable view of the plaintiff's conduct. There is not a trace of any vindictiveness or wrong motive. They thought that in the interest of the company the plaintiff should cease to be a director, but in the circumstances of this case that fact does not suggest want of good faith, and in my opinion the evidence directly negatives any such suggestion.

The jury were also asked to give their opinion upon the further question whether the alteration of the articles was for the benefit of the company. They answered that it was incidentally for the benefit of the company. What they meant exactly I do not know. If they meant that it was for the benefit of the company there are certainly no grounds for setting such a verdict aside; it could not be described as a conclusion which twelve reasonable men could not have come to. But I will assume that there is no direct finding upon this question, and that the Court is left to deal with the case as a judge of the Chancery Division would act if asked to interfere with an attempt by a company to alter its articles of association. Then the first thing to be considered is whether, in formulating the test I have mentioned, Lindley M.R. had in mind two separate and distinct matters; first, bona fides, the state of mind of the persons whose act is complained of, and secondly, whether the alteration is for the benefit of the company, apart altogether from the state of mind of those who procured it. In my opinion this view of the test has been negatived by this Court in *Sidebottom's* case. (1) So the test is whether the alteration of the articles was in the opinion of the shareholders for the benefit of the company. By what criterion is the Court to ascertain the opinion of the shareholders upon this question? The alteration may be so oppressive as to cast suspicion on the honesty of the persons responsible for it, or so extravagant that no reasonable men could really consider it for the benefit of the company. In such cases the Court is, I think, entitled to treat the conduct of shareholders as it does the verdict of a jury, and to say that the alteration of a company's articles shall not stand if it is such that no reasonable men could consider it for the benefit of the company. Or, if the facts should raise the question, the Court may be able to apply another test—namely, whether or not the action of the shareholders is capable of being considered for the

(1) [1920] 1 Ch. 154.

benefit of the company. I cannot agree with what seems to have been the view of Peterson J. in *Dafen Tinplate Co.* v. *Llanelly Steel Co.* (1), that whenever the Court and the shareholders may differ in opinion upon what is for the benefit of the company, the view of the Court must prevail. In the present case it seems to me impossible to say that the action of these defendants was either incapable of being for the benefit of the company or such that no reasonable men could consider it for the benefit of the company. It is idle to say that their action was directed against the plaintiff, because the more outrageous the conduct of a director the more certain it is that his removal will be bona fide for the benefit of the company, and the more certainly will the efforts of the shareholders, acting bona fide and for the benefit of the company, be directed against him, because it is necessary to protect the company against such conduct for the future. For these reasons I am of opinion that this appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. At the time when this action commenced the plaintiff was a permanent director of the defendant company, holding office so long as he should live unless he came under one of the six disqualifications named in No. 22 of the articles of association. He was also works manager of the company at a salary. In 1924 it came to the knowledge of the other directors that during eleven months he had on twenty-two occasions failed to account for sums which he had received. They took the view that this conduct justified them in immediately dismissing him from the position of manager. They took advice upon their powers under the articles, and came to the conclusion that they could only remove him from his position as director by holding an extraordinary general meeting of the company and altering the articles by adding to art. 22 another condition vacating the office of a director —namely, "If he be requested in writing by all the other directors to resign his office." When the intention of these directors to propose that alteration came to the notice of the plaintiff he issued a writ claiming, first, damages for wrongful dismissal from his post as manager, and secondly, a declaration that he was a permanent director (which in fact he was at the time), and an injunction to restrain the company from altering the articles of association. In consequence of these proceedings the extraordinary general meeting at first proposed was postponed; but, the judge in chambers and this Court having refused the injunction, the general meeting was held and the alteration in the articles was made. Nothing was done upon it immediately, but subsequently, when it was found that a son of the plaintiff employed by a competing firm was canvassing the customers of the defendant company, the other directors sent a written request to the plaintiff to resign his office. The action for wrongful dismissal came on for hearing before a judge and jury. The jury found that failure on twenty-two occasions to account for sums of money was not a ground for dismissing a manager without notice. The learned judge disagreed with that verdict and the defendants appealed to this Court to set it aside; but as there were grounds on which the jury could come to their conclusion, we dismissed the appeal.

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(1) [1920] 2 Ch. 124.

Then came the second part of this case, the part we are now considering—namely, the plaintiff's claim for a declaration that he is still a permanent director and for an injunction restraining the company from making or acting upon the alteration of the articles. Upon this part of the case the learned judge left to the jury the question whether the alteration was made in good faith for the benefit of the company. The jury gave a twofold answer: (1.) that the alteration was not bona fide; (2.) that incidentally it was for the benefit of the company. On these findings Avory J. held that there was no evidence of lack of good faith, and entered judgment for the company; and the plaintiff appeals.

In my opinion Avory J. was right in holding that there was no evidence on which a reasonable jury could find that the directors acted otherwise than in good faith. In my

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view the plaintiff's failure to account for twenty-two items continuing up to and after the writ, all of which were ultimately admitted, was a very serious default in the management of the company; the directors considered this alteration of the articles under careful advice, with no precipitation, and with a genuine desire to remedy the evil, which was forced upon them, of having a man, whom they could admittedly have dismissed with notice from the post of manager, still sitting with them as a director in spite of his laxity in the management of the business entrusted to him; and I can see no evidence to justify the jury in finding that their determination was taken maliciously, or with any desire to spite the plaintiff, or from any motive but that of doing what they thought best in the interest of the company. If there was no evidence of lack of good faith, the other finding of the jury makes an end of this appeal. That finding is that the alteration of the article was for the benefit of the company. It is true they say it was "incidentally" for the benefit of the company. That must mean, I suppose, that the shareholders were primarily actuated by malice and that they were maliciously doing a thing which was for the benefit of the company. But now it must be taken that there was no evidence of malice, and so there still remains a finding that the action of the shareholders was for the benefit of the company. That would apparently conclude this case but for one point which Mr. Porter raised—namely, that art. 22 in its original form constituted a contract between the company and the plaintiff, that he should be a permanent director for life, except in the events specified in that article, a contract which could not be varied without the consent of both parties; and that the plaintiff never consented to the article in its altered form. That argument would be sound if he could show a contract outside the articles; for then an alteration of the articles would not affect the contract. A good example of that principle is *Nelson* v. *James Nelson & Sons.* (1) There the articles of association of a company empowered the directors to appoint a managing director and to revoke his appointment. They appointed by a separate document in writing a managing director for a specified term. During the term they tried to use the articles to revoke the appointment. The Court held that the contract being outside the articles could not be altered without the consent of both parties. But if a contract is contained in the articles it must be, as the articles themselves are, subject to alteration in accordance with the power given by s. 13 of the Companies (Consolidation) Act, 1908. Consequently the plaintiff's contract, if any, is not a contract constituting him a permanent director unconditionally, but is a contract constituting him a permanent director subject to the power of terminating his appointment in accordance with the articles or any modification of the articles sanctioned by the Companies Act. So far, therefore, the appeal fails.

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(1) [1914] 2 K. B. 770.

Then Mr. Porter advanced an argument based on an expression of Peterson J. in *Dafen Tinplate Co.* v. *Llanelly Steel Co.* (1) He contended that the question is not what the shareholders think, but what the Court thinks is for the benefit of the company—I suppose he would treat the verdict of the jury in the same way—that the Court must be satisfied that the alteration of the articles is genuinely for the benefit of the company, and that in this case the Court on the materials before it ought to be of opinion that this alteration was not genuinely for the benefit of the company and ought therefore to reject the honest opinion of the shareholders and the equally honest opinion of the jury and declare that the alteration is invalid. To adopt that view would be to make the Court the manager of the affairs of innumerable companies instead of the shareholders themselves. I think it is a mistaken view, based on a misunderstanding of an expression used by Lindley M.R. in *Allen's* case (2) and by Lord Sterndale M.R. in *Sidebottom's* case. (3) Speaking of the power of altering articles, Lindley M.R. said (2): "It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole."

(1) [1920] 2 Ch. 124.
(2) [1900] 1 Ch. 656, 671.
(3) [1920] 1 Ch. 154, 167.

The important words are "exercised bona fide for the benefit of the company." I do not read those words as importing two conditions, (1.) that the alteration must be found to be bona fide, and (2.) that, whether bona fide or not, it must be in the opinion of the Court for the benefit of the company. I read them as meaning that the shareholders must act honestly having regard to and endeavouring to act for the benefit of the company. In *Sidebottom's* case (1) Lord Sterndale M.R., after putting the question: "Did they do it bona fide for the benefit of the company?" proceeds to comment on the judgment of Astbury J. in the Court below, and says that the learned judge "found as a fact that the majority shareholders . . . . were not doing this for the benefit of the company or in the interests of the company at large, but entirely for their own benefit, and in their own interests. If that finding be right, and as to that I say nothing, it was not bona fide; it was not done for the benefit of the company, but for the benefit of themselves." As I understand him, the Master of the Rolls is contrasting the acts of those, who honestly endeavour to decide and to act for the benefit of the company as a whole, with the conduct of others who act with a view to the interest of some of the shareholders and against that of others. Now when persons, honestly endeavouring to decide what will be for the benefit of the company and to act accordingly, decide upon a particular course, then, provided there are grounds on which reasonable men could come to the same decision, it does not matter whether the Court would or would not come to the same decision or a different decision. It is not the business of the Court to manage the affairs of the company. That is for the shareholders and directors. The absence of any reasonable ground for deciding that a certain course of action is conducive to the benefit of the company may be a ground for finding lack of good faith or for finding that the shareholders, with the best motives, have not considered the matters which they ought to have considered. On either of these findings their decision might be set aside.

(1) [1920] 1 Ch. 167.

But I should be sorry to see the Court go beyond this and take upon itself the management of concerns which others may understand far better than the Court does. So with regard to the passage, relied on by Mr. Porter, from the judgment in the *Dafen Tinplate Co.'s* case (1), I can only say, if Peterson J. means that, whatever the honest decision of the shareholders may be, it is the opinion of the Court, and not that of the shareholders, which is to prevail, I disagree with that interpretation of the words of Lindley M.R. in *Allen's* case. (2) If the learned judge merely means that the Court will interfere where the decision of the shareholders, though honest, is such that no reasonable men could have come to it upon proper materials, I do not object to that explanation, and I should be prepared to act accordingly; but as reported I think the test laid down by the learned judge is erroneous for the reasons I have given. I think the appeal fails and must be dismissed.

ATKIN L.J. I agree. The plaintiff was a director of the defendant company from May, 1921, when the company was incorporated, until 1926. Up to 1924 he was a director on the terms of art. 18, which provided that he and others should be the first directors of the company, that they should be permanent directors, and that each of them should be entitled to hold office so long as he should live, unless he should become disqualified from any of the causes specified in art. 22. At that time art. 22 provided that the office of director should be vacated in any of the events specified in the six clauses of the article. In 1924 the company passed an altered article by a special resolution in pursuance of s. 13 of the Companies (Consolidation) Act, 1908, adding to the six clauses of art. 22 a seventh clause: "If he shall be requested in writing by all the other directors to resign his office." Some ten or eleven months after art. 22 was altered he was requested in writing to resign his office. He claims in this action that the clause added to the article is invalid, and that he still remains a director.

The first question is whether the original articles

(1) [1920] 2 Ch. 124, 140.

(2) [1900] 1 Ch. 656, 671.

constituted a contract between the company and the plaintiff making him a permanent director, in which case the alteration of art. 22, being inconsistent with the contract, would not be permitted by the Court and would be invalid. That depends upon whether there was such a contract as would be broken by the alteration of the article. The principle to be invoked was laid down by Lindley M.R. in *Allen* v. *Gold Reefs of West Africa, Ld.* (1), in these words: "But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered." In considering that question it is to be remembered that the defendant company was formed to take over the business of a firm the partners in which were afterwards three of the directors of the company, Mr. Beare, Mr. E. B. Norris and the plaintiff. The memorandum recites that the company is formed for acquiring their business on the terms of an agreement, which has not been put in evidence, but which is said to contain no appointment of the partners as permanent directors. Therefore the contract that they shall be permanent directors at a salary is contained in the articles only, and it is a contract made not only with the three former partners but with two other directors, T. Norris and H. L. Fritche, and they also hold office unless disqualified for any of the causes specified in art. 22. In these circumstances the proper inference appears to be that there was a contract that the plaintiff should be a permanent director, but a contract contained in articles which could be altered

(1) [1900] 1 Ch. 656, 673.

by a special resolution of the company in accordance with the provisions of the Companies Act; and inasmuch as the contract contemplated the permanent office being vacated in one of six contingencies, it is not inconsistent with the contract that the article should be altered so as to add a seventh contingency. In other words, it is a contract made upon the terms of an alterable article, and therefore neither of the contracting parties can complain if the article is altered. Consequently I cannot find that there has been any breach of contract in making the alteration.

The only other question is whether the article is upon general principles objectionable as being not honestly made within the powers of the company. Here the limits to the power of a company to alter its articles have to be considered. Certain limits there are, and they have been laid down in several cases, notably by Lindley M.R. in *Allen* v. *Gold Reefs of West Africa, Ld.* (1), the case I have already referred to upon the first point. There in a reasoned and lucid judgment the Master of the Rolls uses the phrase "bona fide for the benefit of the company." But neither this Court nor any other Court should consider itself fettered by the form of words, as if it were a phrase in an Act of Parliament which must be accepted and construed as it stands. We must study what its real meaning is by the light of the principles which were being laid down by the Master of the Rolls when he used the phrase. I am satisfied that the true meaning of the words and the principle to be applied have been stated in the judgments of my brothers. The only question is whether or not the shareholders, in considering whether they shall alter articles, honestly intend to exercise their powers for the benefit of the company. If they do then, subject to one or two reservations which have been explained, the alteration must stand. It is not matter of law for the Court whether or not a particular alteration is for the benefit of the company; nor is it the business of a judge to review the decision of every company in the country on these questions. And even if the question were not for

(1) [1900] 1 Ch. 656.

the shareholders themselves, but for some other body, it must be a question of fact. In this case there is a finding of fact by the jury that the alteration was for the benefit of the company; but I do not decide the case on that ground. In my view the question is solely for the shareholders acting in good faith. The circumstances may be such as to lead to one conclusion only, that the majority of the shareholders are acting so oppressively that they cannot be acting in good faith; or, to put it in another way, it may be that their decision must be one which could be taken by persons acting in good faith with a view to the benefit of the company. But these are matters outside and apart from the question, Does this or that tribunal consider, in the light of events which have happened, that the alteration was or was not for the benefit of the company? With great respect to a very learned judge I cannot agree with the judgment of Peterson J. to the contrary on this point. (1) In my view the passage which has been cited from the judgment of Lord Sterndale M.R. in *Sidebottom's* case (2) makes it clear that in his view the ultimate decision is to be the decision of the majority of the shareholders.

I should like to add a word upon the finding of the jury that the company did not act in good faith. I am satisfied that there was no evidence on which they could properly come to that conclusion. The alteration of art. 22 empowered the directors to act not only against one particular member of the board; all the directors were thereby exposed to the exercise of the new power. And it was eventually exercised not by reason only of the events which led to the alteration but because of another set of circumstances arising independently some ten months after the alteration. I think therefore that the plaintiff's appeal fails.

Appeal dismissed.

Solicitors for appellant: *Amery Parkes & Co.*

Solicitors for respondents: *Rutland & Crauford, for C. Ruffe Thomas, Maidenhead.*

W. H. G.

(1) [1920] 2 Ch. 124.

(2) [1920] 1 Ch. 154, 167.

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Nov. 15, 16.

[IN THE COURT OF APPEAL.]

GREER *v.* DOWNS SUPPLY COMPANY.

Principal and Agent—Sale of Goods by Agent—Debt due from Agent—Set-off—Claim by Principal—Contract with Agent—Constructive Notice of Agency.

As a general rule the equitable doctrines of constructive notice are not to be extended to purely commercial transactions.

One G., while employed as a traveller by a firm of builders, had become indebted to the defendant in a sum of 17*l.* for goods sold. He met the defendant and asked him to buy some timber from him, telling him that he had left the employment of the builders and had set up as a timber merchant in London on his own account. The defendant agreed to order timber from him on the terms that G.'s debt of 17*l.* should be set off against the price. G. had not set up in business on his own account, but was employed by the plaintiff as an agent for sale on commission. The defendant ordered timber from G., as he had agreed, and timber was delivered to him with invoices and letters bearing the name and address and description of the plaintiff which G. told the defendant were his own trade name, address, and description. The plaintiff brought an action in the county court for the price of the timber. The county court judge found that the defendant honestly believed that the name, address, and description on the invoices and letters were those of G., but that the defendant was put upon inquiry by the invoices and letters, and therefore had notice that G. was not selling as a principal but only as an agent for the plaintiff; he therefore gave judgment for the plaintiff for the price of the timber:—

Held, affirming the judgment of a Divisional Court and reversing the judgment of the county court, that the defendant had no more than constructive notice that the plaintiff was the principal of G.; that in the circumstances constructive notice was not equivalent to actual notice; that the defendant had made no contract with the plaintiff, and was therefore entitled to judgment.

Principle of *Manchester Trust* v. *Furness* [1895] 2 Q. B. 539 applied.

APPEAL from the judgment of a Divisional Court reversing the judgment of the Mayor's and City of London Court.

The plaintiff, a timber merchant carrying on business in Queen Victoria Street, London, sued the defendant, whose name was Chandon, but who traded as the Downs Supply Co. and was a timber merchant carrying on business at Brighton. The action was brought to recover 29*l.* 2*s.* 6*d.* for timber alleged to have been supplied by the plaintiff to the defendant in April, 1925. The defendant denied that there was any contract between him and the plaintiff, and, if there was any such contract, he counterclaimed a sum of 17*l.* 5*s.*, mainly for timber supplied to one Godwin, but including 3*s.* lent and 3*s.* the value of goods supplied to the said Godwin, as hereafter appearing.

Godwin was formerly a traveller for a firm of White & Co., who carried on business as builders at Brighton, where the defendant had met him. In February, 1925, the defendant sold to Godwin, not as agent for White & Co., but on his own account, some timber to the value of 16*l.* 19*s.* He also lent Godwin 3*s.* and supplied him with a petrol can of the value of 3*s.*

In March, 1925, while these sums amounting to 17*l.* 5*s.* were still owing to the defendant, Godwin saw him and asked him for an order, telling him that he had left White & Co., of Brighton, which was true, and also that he had set up business on his own account in Queen Victoria Street, which was untrue. In fact he was employed by the plaintiff as an agent for sale on commission. The defendant agreed to buy from Godwin certain timber, which he had to sell, at a price which after certain allowances came to 29*l.* 2*s.* 6*d.*, on condition that the only money to be paid by the defendant should be the difference between the price of the timber and 17*l.* 5*s.* Accordingly on March 23, 1925, the defendant gave Godwin an order for part of the timber. In reply to the order, namely, on March 27, Godwin sent to the defendant a letter signed by himself as though he were a principal, but written upon paper bearing the name and address of the plaintiff, "W. MacGregor Greer, English Timber Merchants, 63 Queen Victoria Street, London, E.C. 4," with two telephone numbers, one in the City of London and one at Brighton, and a sketch or impression representing railway trucks and trunks of trees. The defendant saw Godwin a few days afterwards and asked him why the name of W. MacGregor Greer appeared at the head of the letter, and Godwin told him that W. MacGregor Greer was his trade name and that he carried on business in Queen Victoria Street under that name. Shortly afterwards, on March 30,

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the defendant gave a second order for timber, making up the quantity for the price of which the action was brought. During the month of April invoices and letters were received by the defendant bearing the name of the plaintiff. On June 10 the plaintiff wrote demanding payment, and on October 16 the writ was issued. The learned judge found that the defendant honestly believed what Godwin had told him, and believed that he was dealing with Godwin as a principal, but that the defendant was put upon inquiry by the letter of March 27 and ought to have made further investigations, in which case he would have found out, and therefore that he had notice, that Godwin was not a principal but was only an agent. He therefore gave judgment for the amount claimed. On appeal the Divisional Court (Roche and Talbot JJ.) held that Godwin had no authority to make the contract relied on by the plaintiff, and, there being no claim for conversion or upon an implied contract from acceptance and user of the plaintiff's goods by the defendant, they reversed the judgment of the learned judge, and entered judgment for the defendant.

The plaintiff appealed.

B. L. O'Malley for the appellant. This is not an ordinary case of an undisclosed principal suing upon a contract made by his agent, in which case the principal adopting the contract must adopt in omnibus. Here the respondent had notice that the appellant was the owner and vendor of the timber: *Pratt* v. *Willey* (1); and therefore he has no right to set off Godwin's debt against the price of the timber unless the appellant has so conducted himself as to enable Godwin to hold himself out as the owner and vendor: *Ramazotti* v. *Bowring* (2); *Cooke & Sons* v. *Eshelby* (3); of which there is no evidence. The question is which of two innocent persons is to suffer for the dishonesty of Godwin. The learned judge rightly held that the respondent should suffer, as he was put upon inquiry by the letter of March 27 and subsequent letters

(1) (1826) 2 C. & P. 350.
(2) (1860) 7 C. B. (N. S.) 851.
(3) (1887) 12 App. Cas. 271.

and invoices. Ordinary diligence on his part would have shown that the plaintiff was the real principal in the transaction. That being so the principle of *Cornish* v. *Abington* (1) and *Wester Moffat Colliery Co.* v. *Jeffrey & Co.* (2) applies and the appellant is entitled to the amount claimed.

W. A. Barton (*C. H. Grundy* with him) for the respondent. The judgment of the Divisional Court was right. Unless the respondent had actual notice that the appellant was the owner of the goods he cannot be made a party to any contract with the appellant for the sale of the goods: *Humble* v. *Hunter* (3); *Boulton* v. *Jones.* (4) His contract was with Godwin and was made with him for reasons personal to Godwin and for the purpose and as a means of obtaining payment of a debt due from him. Therefore at the least the respondent would be entitled to set off the amount of the debt: *Boulton* v. *Jones.* (4) There is no evidence that he used the goods after he became aware of the appellant's true position, and even if ther was, no claim was made at the trial upon any contract to be implied from user of the goods after such notice. The letter of March 27 and the invoices following it at the most gave him constructive notice of the appellant's title. But constructive notice is not sufficient: *Manchester Trust* v. *Furness.* (5)

O'Malley in reply.

BANKES L.J. This is an appeal from the decision of a Divisional Court setting aside a judgment of the learned judge of the Mayor's and City of London Court. It is necessary to bear in mind that in these appeals we are bound by the findings of fact in the Court below and precluded from deciding upon any point to which the attention of the judge was not directed. The inference from the facts is the matter in dispute in this case.

The appellant is a timber merchant. He had in his employ a traveller named Godwin who had formerly been in the employ of Messrs. White & Co., builders in Brighton. While

(1) (1859) 4 H. & N. 549.
(2) 1911 S. C. 346.
(3) (1848) 12 Q. B. 310.
(4) (1857) 2 H. & N. 564.
(5) [1895] 2 Q. B. 539.

he was there Godwin had bought timber from the respondent, whose name was Chandon, but who carried on business as the Downs Supply Co., and he had had other small dealings with him, the result of which was that Godwin owed the respondent in all about 17*l.* Godwin left White & Co. and went into the appellant's employment still owing the respondent the 17*l.* He then went to the respondent and asked him for an order for timber and the respondent, believing that he was dealing with Godwin as a principal, for Godwin never mentioned his employer, consented to give him two orders on condition that he should be allowed to set off Godwin's debt of 17*l.* against the price of the timber. Godwin having obtained these orders passed them on to his employer, the appellant, who delivered the goods to the respondent, thinking that he was executing orders obtained by his traveller Godwin. His case is that he was dealing direct with the respondent, while the respondent asserts that he for his part was dealing with Godwin and only in order that by giving him the orders he might get payment of his debt. The judge who tried the case has found that the respondent honestly believed Godwin's story that he carried on business under the name of the appellant. Now the appellant, if he could have proved that the respondent had used or converted the goods after he had actual knowledge that they were the goods of the appellant, might have founded an action upon a contract to be implied from those facts; but in order to do that he must have proved more than he proved before the learned judge, and as he did not base his action on that ground he cannot use it as a ground for appealing. The judge decided on a different ground. He held that the respondent when he received the letter of March 27 was put upon inquiry, and that, having had what was at the best constructive notice, he must be taken to have had actual notice that the goods were the appellant's goods, and therefore that he ought to pay for them. I cannot agree with this view. There is authority for saying that in commercial matters the Court should be loth to take constructive notice as a substitute for actual notice. Bramwell B.

in *Boulton* v. *Jones* (1) correctly states the law on this point. There the defendants gave to one Brocklehurst, with whom they had a running account, an order for goods of which he had been a manufacturer. Boulton had been his foreman and manager, but had bought his stock, fixtures and business. When the order came Boulton sent the goods and afterwards an invoice. The defendants declined to pay for the goods on the ground that they knew nothing of Boulton. Bramwell B. said: "The admitted facts are, that the defendants sent to a shop an order for goods, supposing they were dealing with Brocklehurst. The plaintiff, who supplied the goods, did not undeceive them. If the plaintiff were now at liberty to sue the defendants, they would be deprived of their right of set-off against Brocklehurst. When a contract is made, in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, or where there might be a set-off, no other person can interpose and adopt the contract. As to the difficulty that the defendants need not pay anybody, I do not see why they should, unless they have made a contract either express or implied. I decide the case on the ground that the defendants did not know that the plaintiff was the person who supplied the goods, and that allowing the plaintiff to treat the contract as made with him would be a prejudice to the defendants." There one of the grounds on which the plaintiff could not recover was that the defendants did not know he was the person supplying the goods. That is adopted as the law in Benjamin on Sale, 6th ed. (1920), p. 121: "Where an offer is addressed to one person, and another attempts to accept it, as by supplying goods ordered, there is no contract; and if the offerer, thinking the goods were sent by the first person, consumes them, he is not bound to pay for them. But if the offerer discovers the facts and afterwards consumes the goods, a contract to pay for them will be implied"; citing *Mitchell* v. *Lapage* (2) and *Boulton* v. *Jones* (3), where Channell B. said: "Without saying that

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(1) 2 H. & N. 564, 566.

(2) (1816) Holt, N. P. 253.

(3) 27 L. J. (Ex.) 117, 119.

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the plaintiff might not have had a right of action on an implied contract, if the goods had been in existence, here the defendant had no notice of the plaintiff's claim, until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them. Without saying what might have been the effect of the receipt of the invoice before the consumption of the goods, it is sufficient to say that in this case the plaintiff clearly is not entitled to sue and deprive the defendant of his set-off." In the circumstances the appellant has fallen short of proving what is necessary to entitle him to recover, because first, the judge has found that the respondent did not, when the goods were delivered, in fact know that the appellant was the vendor; and secondly, there was no evidence whether the respondent when he did become aware of the appellant, could or could not have returned the goods. For these reasons the appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. If this Court could review the findings of fact by the learned judge, or find facts for itself, there might be more to be said for the appellant. But this is a county court appeal in which we are bound by the findings of fact at the trial and cannot hear argument upon points not raised there. The facts are that the respondent, a man of foreign extraction, carried on business as the Downs Supply Co. He had sold goods to one Godwin and had not been paid for them and was out of pocket to the amount of 17*l.* Godwin came to him and asked if he might sell him some timber, and the respondent, hoping to get payment by means of a set-off and honestly believing that he was making a contract with Godwin, agreed to buy certain timber upon the terms that he should only pay the difference between the price of the timber and 17*l.* Then came an invoice bearing upon it the name W. MacGregor Greer, which is the name of the appellant, on receipt of which the respondent when he next met Godwin asked him who W. MacGregor Greer was, and Godwin said it was his own trade name and that he was W. MacGregor Greer. The respondent believed what he was told. As the timber was not paid for the appellant sent an account upon a form which showed that he was not Godwin but was somebody else. There is no evidence to show whether or not the goods had been consumed by the time that account reached the respondent. Then the appellant brought an action against the respondent on the footing that he had through his agent Godwin made a contract of sale with the respondent. He might possibly have sued the respondent for conversion of the goods, as was done in *Cundy* v. *Lindsay.* (1) He might, for all we know, have proved that the respondent still had the goods in his possession when it became clear to him that the appellant was the real vendor, and that he had used the goods with that knowledge, in which case we should have had to consider certain dicta in *Boulton* v. *Jones.* (2) But neither of these cases was made at the trial. The appellant issued a plaint for goods sold and delivered, and the original orders given by the respondent to Godwin were furnished as particulars of the contract of sale. When a plaintiff claims as an undisclosed principal the question sometimes arises whether the contract was made with the agent for reasons personal to the agent which induced the other party to contract with the agent to the exclusion of his principal or any one else. When the learned judge at the trial found that the respondent knew nothing about the appellant and honestly believed he was contracting with Godwin and when it was proved that he was contracting with Godwin because Godwin was his debtor, there was an end of the case for the appellant at the trial. The learned judge did find those facts; but he went on to find that although the appellant did honestly believe he was dealing with Godwin, yet he had notice which ought to have put him upon inquiry. Now that finding could only be relevant if the doctrine of constructive notice, whereby a person is deemed to have known that which he might have discovered upon inquiry, can properly be applied in purely commercial transactions. Upon this question I would refer to the

(1) (1878) 3 App. Cas. 459.

(2) 2 H. & N. 564; 27 L. J. (Ex.) 117.

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classical judgment of Lindley L.J. in *Manchester Trust* v. *Furness* (1), where he says: "As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country." These words of Lindley L.J. met with the full approval of Lopes and Rigby L.JJ.; and in my opinion if one party to a purely commercial transaction makes a contract with another in ignorance of the fact that the latter is an agent merely and in the honest belief that he is a principal, it is generally of no use to say he was negligent in entertaining his honest belief. The proposition that negligence might be equivalent to fraud was negatived in *Derry* v. *Peek* (2) and the proposition that in commercial transactions a man is taken to know what he has the means of knowing is discountenanced in *Manchester Trust* v. *Furness* (3), and therefore the learned judge, having found that the respondent honestly believed he was contracting with Godwin, was wrong in thinking that he could annul the effect of that finding because there was matter which might have put the respondent upon inquiry. In the result the claim fails, for there is no evidence of a purchase by the appellant from the respondent. No case was made upon any implied contract until the parties reached this Court, and so we cannot deal with any such point. If there had been a real counterclaim for 17*l.* that

(1) [1895] 2 Q. B. 539, 545.
(2) (1889) 14 App. Cas. 337.
(3) [1895] 2 Q. B. 539.

must have failed also, but that sum seems to have been treated as a set-off. The judgment of the Divisional Court must be affirmed and the appeal must be dismissed.

LAWRENCE L.J. I agree. The appellant based his claim upon a contract which was in fact made between the respondent and Godwin and one of the terms of which was that the respondent should be allowed to set off 17*l.* against the contract price. The appellant suing upon that contract is bound by the term as to set-off unless he can show that the respondent is estopped from relying upon such term. The appellant contends that the respondent is so estopped because he had constructive notice that Godwin was not the real vendor of the goods. But that contention cannot prevail in the face of the judgment of Lindley L.J. in *Manchester Trust* v. *Furness* (1) that the doctrine of constructive notice is not to be extended to ordinary commercial transactions. The result is that the respondent, who bona fide believed that he was contracting with Godwin, is not to be treated as having contracted with the appellant merely because further inquiries might have disclosed that the appellant was the real vendor.

Appeal dismissed.

Solicitor for appellant: *W. Allin Ford.*

Solicitors for respondent: *Gordon Gardiner, Carpenter & Co.*

(1) [1895] 2 Q. B. 539.

W. H. G.

K. B. D.
1926
July 23.
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1927
Feb. 11, 15;
March 11.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

LEVENE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Residence in United Kingdom—Ordinary Residence—Factors to be considered in determining Question—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 46, *sub-s.* 1 — *General Rules applicable to Sch. C, r.* 2 (*d*).

The appellant, a British subject, lived in London until 1918, when he went abroad with the intention of living there. He returned to the United Kingdom for a period of about five months in each year until 1925, but had no fixed residence either in the United Kingdom or abroad during those years. The appellant was assessed to income tax for the years 1920 to 1925 in respect of (*a*) securities of British possessions, and (*b*) British War Loan. He claimed relief under r. 2 (*d*) of the Rules applicable to Sch. C, and under s. 46 of the Income Tax Act, 1918, on the ground that he was neither "resident" nor "ordinarily resident" in the United Kingdom for the years in question. The Special Commissioners of Income Tax dismissed his claim:—

Held, by Rowlatt J. and the Court of Appeal, affirming the Commissioners' decision, that the appellant was both "resident" and "ordinarily resident" in the United Kingdom. A person may be "resident" in the United Kingdom although he has no fixed abode there.

Held also by Rowlatt J. that the words "ordinarily resident" meant that a person's residence, although not necessarily preponderating in point of time, is habitual, and in the ordinary course of his life.

Held further by Lord Hanworth M.R. that residence was a question of degree and of fact; that willing and repeated return to the same place for purposes of recreation was one important factor; and that another was return to the party's own country for the company of relatives or friends.

Reid v. *Inland Revenue Commissioners* 1926 S. L. T. 365 approved and followed.

CASE stated by Special Commissioners under the Income Tax Act, 1918, s. 149.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 8, 1925, for the purpose of hearing appeals, the said Commissioners heard and determined claims for relief from income tax made by the appellant, Louis N. Levene, for the years ending respectively April 5, 1921, April 5, 1922, April 5, 1923, April 5, 1924, and April 5, 1925.

The facts according to the case stated were as follows :—

At all material times the appellant was the owner of securities of British possessions, and in respect of the income arising therefrom he claimed relief under r. 2 (*d*) of Sch. C of the Income Tax Act, 1918 (1), on the ground that he was not resident in the United Kingdom for the years in question. He was also the owner of British War Loan, and in respect of the income arising therefrom he claimed relief under s. 46 of the Income Tax Act, 1918, on the ground that he was not ordinarily resident in the United Kingdom for the years in question. These claims had been refused by the Commissioners of Inland Revenue.

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(1) Sect. 46, sub-s. 1, of the Income Tax Act, 1918 : "Where the Treasury have before the commencement of this Act issued or may thereafter issue any securities . . . . with a condition that the interest thereon shall not be liable to tax or super tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest of securities issued with such a condition shall be exempt accordingly."

By r. 2 of the General Rules applicable to Sch. C: "No tax shall be chargeable in respect of . . . . (*d*) the interest or dividends on any securities of a foreign State or a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the Commissioners of Inland Revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom. . . . ."

By r. 2 of the Miscellaneous Rules applicable to Sch. D: "A person shall not be charged to tax under this Schedule as a person residing in the United Kingdom, in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, who is in the United Kingdom for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment, but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year."

By the General Rules applicable to All Schedules, r. 3: "Every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax, notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad, and shall be charged as a person actually residing in the United Kingdom upon the whole amount of his profits or gains, whether they arise from property in the United Kingdom or elsewhere. . . . ."

The appellant was a British subject, and was formerly interested in a financial business in London. He discontinued this business in 1911 and since that date had had no occupation. He lived in a house in Curzon Street, London, of which he held a lease, until early in 1918, when he decided to break up his establishment and (to use his own expression) to "live abroad." On March 20 and 21, 1918, his furniture, with the exception of a few articles which were included in his marriage settlement and had since been stored in London by order of the trustees, was sold by auction, and on April 3, 1918, he surrendered the lease of his house, making a payment of 400*l.* to the freeholders on account of rent and dilapidations.

From March, 1918, until December, 1919, the appellant continued to live in the United Kingdom in hotels. In December, 1919, he went abroad and did not return until July 10, 1920, since which time he had been in the United Kingdom for periods of about five months in each year.

From March, 1918, until January, 1925, the appellant had no fixed place of abode, but stayed in hotels, whether in this country or abroad. He did not retain rooms at any hotel when absent, nor was there any hotel in which he stayed so long or to which he returned so frequently that it could in any sense be described as his home. When in France he paid the Visitors Tax. In the course of the years 1922, 1923 and 1924, he made endeavours to find a suitable flat in Monaco, but the negotiations came to nothing, since none of the premises inspected were suitable, until in January, 1925, he took a lease of a flat in Park Palace, Monte Carlo, for nine years, for which he paid a premium of 130,000 francs and lived there with his wife until he came to England for the purposes of the appeal. These premises were furnished by the appellant. It was his intention to return to Monte Carlo and to live in his flat there with his wife. He expected to continue to make visits to England, though not to such an extent as in the past. Since he gave up his house in 1918 he had had no intention of again taking a house or flat in the United Kingdom.

The appellant was married, but had no children. His wife almost always accompanied him in his movements. Both he and his wife had indifferent health, and had been advised to live in the South of France and avoid the United Kingdom in the winter months. One of the reasons for their visits to England was to obtain medical advice. They also came to visit their relatives. Other reasons for his coming to England annually were to take part in certain Jewish religious observances, to visit the graves of his parents, who were buried at Southampton, and to deal with his income tax affairs.

The appellant had always kept a bank account in London, and since 1919 had accounts in Paris, in Nice, and since 1923 in Monte Carlo. Since giving up his residence here in 1918 the London bank account had only been operated on to a small extent, such as for payment of charitable subscriptions and other expenses incurred in this country.

It was contended on behalf of the appellant:—

(1.) That since December, 1919, he had not been resident or ordinarily resident in the United Kingdom.

(2.) That under r. 2 (*d*) of the General Rules applicable to Sch. C, he was entitled to exemption from income tax in respect of the interest or dividends on any securities of a foreign state or a British possession owned by him; and

(3.) That under s. 46 of the Income Tax Act, 1918, he was entitled to exemption from income tax in respect of the interest on British Government securities issued with the condition that the interest thereon should not be liable to income tax so long as it was shown that the securities were in the beneficial ownership of persons not ordinarily resident in the United Kingdom.

It was contended on behalf of the Crown (inter alia):—

(1.) That the appellant had left the United Kingdom for the purpose only of occasional residence abroad within the meaning of r. 3 of the General Rules applicable to Schs. A, B, C, D and E contained in the First Schedule to the Income Tax Act, 1918.

(2.) That his regular coming to the United Kingdom for periods of from four to five months in each year showed that he was in the United Kingdom as part of the ordinary habits of his life.

(3.) That during the years in question the appellant was resident and ordinarily resident in the United Kingdom, and that he was not entitled to the relief claimed.

The Commissioners who heard the appeal gave their decision in the following terms:—

"The appellant is a British subject and until March, 1918, he was a householder in London. He then surrendered the lease of his house and sold his furniture, and from March, 1918, until January, 1925, he did not occupy any fixed place of residence, but lived in hotels, whether in this country or abroad. He was admittedly resident and ordinarily resident in the United Kingdom until December, 1919. He then went abroad, and in each subsequent year he has spent between seven and eight months abroad and between four and five months in the United Kingdom. We are satisfied upon the evidence that when he left the United Kingdom in December, 1919, he had formed the intention, which he has consistently carried out ever since, of living abroad for the greater part of the year, but of returning to this country each year and remaining here for considerable periods, but not for a period equal in the whole to six months in any year. The questions for decision are whether he was entitled to exemption from income tax on War Loan interest under s. 46 of the Income Tax Act, 1918, as a person not ordinarily resident in the United Kingdom, and on interest on securities of British possessions under r. 2 (*d*) of the General Rules applicable to Sch. C as a person not resident in the United Kingdom, and the years under review are 1921–22, 1922–23, 1923–24 and 1924–25. These are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom. The claims for the years in question therefore fail. In arriving at this decision we have not ignored r. 2 of the Miscellaneous Rules applicable to Sch. D. (1) Although in terms that rule, like the portion of s. 39 of the Act of 1842 reproduced in it, applies only to Sch. D, we consider that on practical grounds and in view of the history of the provisions of the Income Tax Acts as to residence, no distinctions can properly be drawn in construing the terms 'resident in the United Kingdom' for the purposes of Sch. C and 'residing in the United Kingdom' for the purposes of Sch. D. But while we do not accept the principle that every person who has been ordinarily resident in the United Kingdom in past years and now has no established place of residence anywhere is necessarily chargeable under r. 3 of the Rules applicable to All Schedules as a person actually residing in the United Kingdom, if he comes here year by year for short periods, we do not think that r. 2 of the Miscellaneous Rules extends to exempt every such person from tax on his income from foreign and colonial sources so long as he fulfils the condition of spending a larger portion of the year out of the United Kingdom than in it. In our view such persons' claims under either Schedule must be determined on the balance of facts in each case."

Latter K.C. and *Cyril King* for the appellant. During the years 1921–25 the appellant had no place of residence in the United Kingdom, and this distinguishes the case from previous cases on the subject. He has been a visitor only, and it cannot be said that he was "ordinarily resident" here. Indeed the Commissioners have not so found. In *Pickles* v. *Foulsham* (2) the subject had a place of residence in England. In *Ex parte Breull* (3) James L.J. said: "I am of opinion that a man may fairly be said to reside where he is to be found daily." Here the appellant was found wandering about from place to place. As regards the War

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(1) See note (1) ante, p. 39.

(2) [1923] 2 K. B. 413; [1924] 1 K. B. 323.

(3) (1880) 16 Ch. D. 484, 487.

Loan, the appellant is exempt from income tax by virtue of s. 46 of the Income Tax Act, 1918, and as regards the securities of British possessions by r. 2 of the General Rules applicable to Sch. C. Rule 2 (*a*) of the Rules applicable to Case IV. of Sch. D, also exempts him as to securities out of the United Kingdom, he being "not ordinarily resident there." The meaning of "ordinary residence" is difficult to define, but it is an approach to domicil, as appears from the Rules applicable to Case IV. of Sch. D, s. 2, r. 2 (*a*). The phrase appears again in r. 3 of the General Rules applicable to All Schedules. There is no direct authority bearing on the case. In *Lloyd* v. *Sulley* (1) a merchant who ordinarily resided in Italy had a place of residence in the United Kingdom where he dwelt for several months in the year. He was held to be liable to tax in respect of the profits of his business abroad. Lord Shand there said: "I am disposed to hold that a person is not liable to the assessment which has been here imposed unless it can be fairly said that he has his ordinary residence in the United Kingdom, an ordinary residence I shall rather say within the United Kingdom, during the period for which the taxation is imposed." It is true, as appears from that case, that a man may have ordinary residences in different places at one time, but here the appellant definitely gave up his London residence in 1919, and he has never returned to this country with the intention of "establishing his residence" here, in the words of r. 2 of the Miscellaneous Rules applicable to Sch. D. In *Reid* v. *Inland Revenue Commissioners* (2) the subject had a substantial banking account in the United Kingdom, and also had stored his personal belongings in London. These facts are not present in the appellant's case, and *Reid* v. *Inland Revenue Commissioners* (2) is therefore distinguishable. The facts here do not warrant the finding of "residence" by the Commissioners, and their decision should be reversed.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the respondents. The Commissioners have found that the appellant is resident in the United Kingdom, and from the facts here "ordinary

(1) (1884) 2 Tax Cas. 37, 44. (2) 1926 S. L. T. 365, 367.

residence" follows. Here there is residence for five months in each year for five successive years. In *Reid* v. *Inland Revenue Commissioners* (1) Lord Clyde points out the difficulty of defining wide and general words, such as "resident in the United Kingdom" and "ordinarily resident." "The result," he says, "is to make the question of law become (as it were) so attenuated, and the field occupied by the questions of fact become so enlarged, as to make it difficult to say that a decision arrived at by the Commissioners, with respect to a particular state of facts held proved by them, is wrong." The finding of the Commissioners here is largely one of fact, and should not be disturbed.

[Upon the meaning of the word "resident" in the United Kingdom they cited the Lord President's judgment in *Lloyd* v. *Sulley* (2) and *Cooper* v. *Cadwalader*. (3)]

Latter K.C. in reply. The appellant has not been in the United Kingdom in the character of a "resident." In *Cooper* v. *Cadwalader* (3) the case turned merely on the distinction between a permanent and a temporary residence: the question was whether a residence had been "established." In *Lloyd* v. *Sulley* (2) the Lord President's judgment is not consistent with that of Lord Shand as regards the meaning of the words "ordinarily resident."

ROWLATT J. The question for consideration in this case concerns the meaning of the words "resident" and "ordinarily resident" which appear in the Income Tax Act, 1918, s. 46, and in various rules to the Schedules to the Act, so far as they affect a person's liability to income tax on annual interest from foreign and colonial securities and on interest from War Loan. These words are clearly not intended to indicate a person's residence in the sense of the building which he occupies. They may be applied to persons who are wanderers in the United Kingdom whatever their mode of life may be. For these are residents in the United Kingdom, although not in any particular spot

(1) 1926 S. L. T. 365, 367.
(2) (1884) 2 Tax Cas. 37, 44.
(3) (1904) 5 Tax Cas. 101.

therein. The ambiguity in the word "resident" arises from the fact that it may mean that a person has attracted to himself a certain quality, or merely that he is living in a certain place. For the purposes of the Income Tax Acts I think that "residence" means a certain quality in a person, that is to say, he may be resident in England and also in Scotland or both, although he is actually living in Paris. This meaning, however, is not always adhered to throughout the Acts. [His Lordship read r. 2 of the Miscellaneous Rules applicable to Sch. D, and continued:] Residence for six months or more in the United Kingdom is enough to make a person chargeable with income tax. Residence for less than that period is not enough, and therefore the meaning attached to these words "resident" and "ordinarily resident" is important. The words "ordinarily resident" may mean resident for a preponderating period of time, or they may mean habitually as a matter of course, although the time occupied in residence may be insignificant. Indeed the adjective "ordinarily" as applied to "resident" introduces a difficulty, because if, as I suggest, the word "resident" describes an attribute of a person, although he may not be living in the place himself, then it is not an apt term by which to qualify the word "resident." For a "resident" cannot be described as "ordinary" or "extraordinary." Some meaning must, however, be attached to the word "ordinary" in this connection; the person described as "ordinarily resident" cannot be the same as a person merely described as "resident." The distinction appears from r. 2 (*a*) of the Rules applicable to Case IV. of Sch. D, which provides that, as regards income from securities in any place out of the United Kingdom, tax shall not be computed on the full amount of a person's income in the year of assessment, if he satisfies the Commissioners that he is not domiciled in the United Kingdom, or that, being a British subject, he is not ordinarily resident in the United Kingdom. In such cases tax is only computed on the full amount of the sums received in the United Kingdom in the year of assessment without any deduction or abatement.

The position is that if the owners are not resident here they are not taxed. If they are so resident then a distinction is made between "residents" and "ordinary residents." Those who are resident simpliciter are to be taxed on the full amount of their income from foreign possessions, whether received here or not, while those who though resident are not "ordinarily resident" are only taxed on income actually received here. However, no question arises in this case under that rule. Rule 3 of the Rules applicable to All Schedules provides that every British subject "whose ordinary residence has been in the United Kingdom" shall be taxed, notwithstanding that at the time of assessment he has left the United Kingdom, if he has left for the purpose of occasional residence abroad. In the General Rules at any rate I think that the word "ordinary" does not mean preponderating in point of time, but that the residence is in the ordinary course of a man's life. It arises when a man's ordinary course of life is such as to disclose residence in the United Kingdom and possibly elsewhere. He may have two ordinary residences if his ordinary course of life is such that he acquires the attribute of residence in both places.

As to the two statutory provisions here in question, s. 46 of the Act applies to cases where tax prima facie is payable regardless of residence, the income arising in the United Kingdom. By that section a person who owns the particular securities there mentioned is exempted from tax if he is not ordinarily resident here, that is to say if his ordinary course of life does not give him the attribute of residence here. The other material provision (r. 2 (*d*) of the Rules applicable to Sch. C) deals with tax on interest or dividends on securities of a foreign state or British possession which are payable in the United Kingdom, and which again prima facie would be taxable without residence; it provides that if the recipient is not resident in the United Kingdom he is excused from liability to tax. Here the Commissioners have found that the appellant is resident here, and if so, in this case, it follows from their decision that he is "ordinarily resident" here. It is true that he is not attached to any particular place, but he

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originally lived here and, although he is not now here for so long as six months in the year, the period referred to in the statute, he visits this country habitually each year and stays about five months. It seems to me that the Commissioners were justified in finding as they did, and their decision must be affirmed. The case seems to me closely to resemble *Reid* v. *Inland Revenue Commissioners* (1), where the Scottish Court of Session came to the same conclusion.

Appeal dismissed.

F. P. F.

The appellant appealed. The appeal was heard on February 11 and 15, 1927.

Latter K.C. and *Cyril King* for the appellant repeated in substance the arguments used by them in the Court below and referred to *Attorney-General* v. *Coote* (2) ; *In re Young* (3) ; *Rogers* v. *Inland Revenue Commissioners* (4) ; *Lloyd* v. *Sulley* (5) ; *Turnbull* v. *Foster* (6) ; *Cooper* v. *Cadwalader.* (7)

Sir Thomas Inskip S.-G. and *R. P. Hills* for the Crown were not called upon to argue.

Cur. adv. vult.

March 11. The following judgments were delivered.

LORD HANWORTH M.R. This is an appeal from a judgment of Rowlatt J. dated July 23, 1926, by which he affirmed the decision of the Commissioners holding the appellant liable to the assessment made upon him.

The questions for decision are whether he was entitled to exemption from income tax on War Loan interest under s. 46 of the Income Tax Act, 1918, as a person not ordinarily resident in the United Kingdom, and on interest on securities of British possessions under r. 2 (*d*) of the General Rules applicable to Sch. C as a person not resident in the United

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(1) 1926 S. L. T. 365.

(2) (1817) 4 Price, 183.

(3) (1875) 1 Tax Cas. 57.

(4) (1879) 1 Tax Cas. 225.

(5) 2 Tax Cas. 37.

(6) (1904) 6 Tax Cas. 206.

(7) 5 Tax Cas. 101.

Kingdom; and the years under review are the four financial years 1921–25.

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It is unnecessary to repeat at length the facts found by the Commissioners, and set out in the case stated. The first three paragraphs of their careful decision summarize sufficiently those upon which the decision must turn: "The appellant is a British subject and until March, 1918, he was a householder in London. He then surrendered the lease of his house and sold his furniture, and from March, 1918, until January, 1925, he did not occupy any fixed place of residence, but lived in hotels, whether in this country or abroad. He was admittedly resident and ordinarily resident in the United Kingdom until December, 1919. He then went abroad, and in each subsequent year he has spent between seven and eight months abroad and between four and five months in the United Kingdom. We are satisfied upon the evidence that when he left the United Kingdom in December, 1919, he had formed the intention, which he has consistently carried out ever since, of living abroad for the greater part of the year, but of returning to this country each year and remaining here for considerable periods but not for a period equal in the whole to six months in any year."

The terms "resident" and "ordinarily resident" occur many times throughout the Income Tax Act, 1918. Thus in s. 46, referred to, the words are "persons who are not ordinarily resident in the United Kingdom"; in cl. 1 of Sch. D, "residing"; in r. 1, applicable to Case IV. of Sch. D, the words are "not resident"; and in r. 2 "not ordinarily resident." There are many other places where the words are to be found. I find it difficult to attach any distinction of meaning to the word "ordinarily" as affecting the term "resident," unless it be to prevent facts which would amount to residence being so estimated, on the ground that they arose from some fortuitous cause, such as illness of the so-called resident, or of some other person, which demanded his continuance at a place for a special purpose otherwise than in accordance with his own usual arrangement and shaping of his movements.

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I agree with Rowlatt J. that to find residence it is not necessary to find a building or "seat" as that word is sometimes used. A resident may pass from place to place, house to house, hotel to hotel, for life at a hotel has become a fixed habit to many owing to the exigencies of modern life, and still be a resident. I also agree with his view as to the meaning and effect of r. 2 of the Miscellaneous Rules applicable to Sch. D. There are a number of decisions upon the meaning of residence in various Acts of Parliament, but none of them assist in deciding the question of its meaning under the Taxing Acts.

Residence must indicate something more than mere presence. In the cases that have been decided on this question, some efforts have been made towards definition, but as a rule by way of contrast to the facts of the case under review.

Thus in *Attorney-General* v. *Coote* (1) the subject had become possessed of a house in Connaught Place. The antithesis put by Graham B. was framed: "Was his residence occasional or for a temporary purpose?" And the answer given, based on the fact of the possession of a house in London, was in the negative. Two sailors were held to be resident where their wives and family lived—(*In re Young* (2) and *Rogers* v. *Inland Revenue Commissioners* (3)—and where they themselves went when on shore.

In *Lloyd* v. *Sulley* (4) Lord Shand negatived residence in the case of a "temporary resident without any characteristic of settled residence about the occupation of his house at Minard," in Argyllshire. *Turnbull* v. *Foster* (5) was held to be in contrast with *Lloyd* v. *Sulley*. (4) The subject was a merchant carrying on business in Madras, and had his usual residence in Madras, and was not in the United Kingdom, at all, during the year of assessment—though his wife and family were there.

In *Cooper* v. *Cadwalader* (6) an American came to Scotland regularly in the shooting season and could have

(1) 4 Price, 183, 188.
(2) 1 Tax Cas. 57.
(3) 1 Tax Cas. 225.
(4) 2 Tax Cas. 37, 45.
(5) 6 Tax Cas. 206.
(6) 5 Tax Cas. 101.

come whenever he liked. He had a complete establishment, so his arrival was not for a casual purpose but in accordance with his intention and habit of life. The above observations or tests, so called, may be of service in order to remind the Court of the points that must not be overlooked, but they afford no concrete definition.

Probably it is not possible to frame one. Residence must depend on questions of degree and of fact; and I think the Commissioners were right in saying that the subject's claim to exemption must be determined on the balance of the facts in each case. I suggest as a characteristic factor for consideration—even if it does not fulfil the nature of a test—to ascertain if the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice: where for a time he is embedded in the enjoyment of what he desired to attain, and found in the abode of his own option. Another factor may be found and an important one—if he returns to and seeks his own fatherland in order to enjoy a sojourn in proximity to his relations and friends. The Commissioners have acted in accordance with these principles. They had abundant material on which in the application of them to the facts of the case their conclusion could be based.

In my judgment they came to a right decision, and I agree with Rowlatt J. For these reasons this appeal must be dismissed with costs.

SARGANT L.J. The appellant here has been charged with income tax for the five financial years ending on April 5, 1925, in respect of (*a*) interest or dividends of securities of British possessions payable in the United Kingdom, and (*b*) income from British War Loan. He has claimed relief from this income tax as to (*a*) under r. 2 (*d*) of the General Rules of Sch. C of the Income Tax Act, 1918, and as to (*b*) under s. 46, sub-s. 1, of the Act itself; and he has been refused relief in both cases, as to (*a*) on the ground that he has not proved that he was not resident in the United

Kingdom, and as to (*b*) on the ground that he has not shown that he was not ordinarily resident in the United Kingdom. In each case the appellant had to prove or show the facts necessary to obtain relief to the Commissioners of Inland Revenue, since the Treasury have directed that claims under s. 46, sub-s. 1, shall be dealt with by the Commissioners of Inland Revenue.

The facts so proved or shown appear in the case stated by the Special Commissioners; and we have to decide on those facts whether the Special Commissioners were wrong in law in deciding that the appellant had not proved that he was not resident in the United Kingdom during the years in question. I use the word "resident" only and omit the phrase "ordinarily resident" because, whatever possible distinction between the word and the phrase may be drawn on the facts of some particular case, I cannot see in the facts of the present case anything to warrant the drawing of any such distinction. His habit of life through each of the five years has been in its ordinary course.

In the rule and the section in question "resident" must I think be given a meaning corresponding to that of "residing" in the phrase "any person residing in the United Kingdom" in heads (*a*) (i.) and (ii.) of the first charging section in Sch. D of the Act. The first meaning of the word "reside" in the concise Oxford Dictionary is "have one's home, dwell permanently"; and that the word is used in this charging section with this connotation appears to be made reasonably clear by r. 2 of the Miscellaneous Rules applicable to Sch. D, which exempts from the class of persons residing in the United Kingdom any person "who is in the United Kingdom" for a temporary purpose only and not with a view or intent of establishing his residence therein and who has not actually resided in the United Kingdom for a total period of six months in the year of assessment. The language of this rule draws a marked distinction between mere physical presence, called "actual residence," which by the final words of the rule makes a person chargeable, if he is actually resident for six months, and that presence which is in the course of being at home and therefore amounts to residence in the ordinary sense. In other words, the residence which makes a person chargeable depends not on mere presence in the United Kingdom (unless that is for six months in all), but on the quality of the presence in relation to the objects and intention of the person sought to be made chargeable.

The appellant lays great stress on the connotation of the word "reside" as implying a home or an establishment, and differentiates his case from those of *Lloyd* v. *Sulley* (1); *Cooper* v. *Cadwalader* (2); *Thomson* v. *Inland Revenue Commissioners* (3); and *Pickles* v. *Foulsham* (4) on the ground that in those cases the taxpayer had a home or establishment in the United Kingdom. He points out that not only did he give up the lease of his house in London in the year 1918, but that since then he has lived entirely in hotels, whether in England or abroad, until January, 1925, when he took a lease for nine years of a flat at Monte Carlo. And he contends that, while merely living at various hotels in the United Kingdom for four or five months in the year, he cannot properly be said to be residing in the United Kingdom within the meaning of the statute.

I agree that the cases referred to do not conclude the matter against the appellant, but, on the other hand, I do not think that they assist him. They determine that when the individual has a home here in the ordinary sense he is taxable; but they do not determine that he cannot have a home here unless he has an establishment here. It seems to me that an individual may so arrange his life as to constitute an hotel his residence in the sense of being his home; and, although, if he stays at a series of hotels in different places in the United Kingdom, he may not be resident in ordinary language at any one of those places, he may yet be resident in the United Kingdom. The very point came up for decision in *Reid* v. *Inland Revenue Commissioners* (5), which was a rather stronger case for the taxpayer than the present and was decided in favour of the Crown; and, in my judgment, that decision was correct.

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(1) 2 Tax Cas. 37.

(2) 5 Tax Cas. 101.

(3) (1918) 56 S. L. R. 10.

(4) [1923] 2 K. B. 413; [1924] 1 K. B. 323.

(5) 1926 S. L. T. 365.

The Special Commissioners have treated the question quite properly as one of degree and to be determined on the balance of facts in each case. They have found the facts most carefully and have stated fully the considerations that actuated them. I cannot find that they have omitted any relevant considerations, or have taken into account any that are irrelevant; and I cannot see any reason for differing from their conclusions or from the judgment of Rowlatt J. It seems to me that, during the years in question, the appellant elected in each such year to adopt a regular system of life in accordance with which he and his wife made their abode and lived in this country for a period of between four and five months in each year, and that they were therefore resident in the United Kingdom not merely in the sense of being present here but in the fuller sense of making their home here.

What practical difference, if any, has been or will be caused in the appellant's position in this respect by the lease of the flat at Monte Carlo from January, 1925, is outside the limits of this case.

LAWRENCE L.J. I agree that this appeal should be dismissed. Rowlatt J. in upholding the decision of the Commissioners has followed the Scotch case of *Reid* v. *Inland Revenue Commissioners.* (1) In my opinion that case was rightly decided and is indistinguishable from the present case.

Appeal dismissed.

Solicitor for appellant: *M. A. Jacobs.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

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(1) 1926 S. L. T. 365.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1926
Nov. 17.
C. A.
1927
Feb. 11, 15, 17;
March 11.

LYSAGHT *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Residence in United Kingdom—Ordinary Residence—Director of English Company—Residence in Irish Free State—Monthly Visits to this Country to attend Directors' Meetings—Question of Fact and of Law—Finding by Commissioners—Appeal—Jurisdiction of Court—Question of Residence one of Law—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 46, *sub-s.* 1—*General Rules applicable to Sch. C, r.* 2 (*d*)—*Miscellaneous Rules applicable to Sch. D, r.* 2.

The appellant was born in England of Irish parents. Up to 1919 he was resident in England, where he lived with his family, and was the managing director of an English company. In 1919 he partially retired from the business and went to live permanently with his family in the Irish Free State. He continued, however, to retain the post of advisory director of the company. After 1919 he had no definite place of abode in England, but he came to England for a meeting of the directors every month, and remained in England for about a week for consultations with the other directors in connection with the company's business. When in England he usually stayed at an hotel. His visits to England were solely for business purposes, and his wife never accompanied him. He had no business interests in Ireland except the management of his estate. His banking account was kept in Ireland, but he had a small account in London. During the past five years he had made three lengthy trips to Australia and South America on behalf of the company. The appellant claimed exemption from income tax on British Government securities under s. 46 of the Income Tax Act, 1918, and repayment of income tax on Foreign and Dominion Government securities under r. 2 (*d*) of the General Rules applicable to Sch. C of the same Act in respect of the two fiscal years ending April 5, 1923, and April 5, 1924, respectively. The Special Commissioners "held" that the appellant was both "ordinarily resident" and "resident" in the United Kingdom for each of the two years in question, and their decision was affirmed by Rowlatt J. On appeal:—

Held, by Lord Hanworth M.R. and Sargant L.J., that there had been no choice by the appellant of England as a desirable abode, and no intention on his part of being here otherwise than in the course of his duties, and that it could not be predicated of him with accuracy that he ever had the intention of making England his home in any sense of the word.

Held, therefore, that the appellant was neither "resident" nor "ordinarily resident" in the United Kingdom within the meaning of r. 2 (*d*) of the Rules applicable to Sch. C or s. 46, sub-s. 1, of the Income Tax Act, 1918, respectively, during the two years in question.

Held, by Lawrence L.J. (dissenting), that the determining factor in the case was that the post which the appellant held in the English company caused him to come regularly to this country and to stay here for a substantial period of each year; and that the fact that the appellant stayed regularly in England for about three months of the year for the discharge of his duties as a servant of the English company constituted him a person who was both "resident" and "ordinarily resident" within the United Kingdom.

Per Sargant L.J.: The presence of the appellant in the United Kingdom might be fairly described as "temporary," notwithstanding that it had been of a regularly recurrent character, and had certainly not been with any "view or intent of establishing his residence therein," and accordingly he came within the exemption granted by r. 2 of the Miscellaneous Rules applicable to Sch. D:—

Held, also, that the question of residence was one of law, and that the Commissioners having found the facts and having then proceeded to decide on those facts that the appellant was "resident" and "ordinarily resident" in the United Kingdom during the years in question, their decision was a conclusion of law and therefore subject to review by the Court within the principles laid down in *Great Western Ry. Co.* v. *Bater* [1922] 2 A. C. 1.

Decision of Rowlatt J. reversed.

CASE stated by Special Commissioners under the Finance Act, 1924, s. 27, and the Income Tax Act, 1918, s. 149.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on September 25, 1925, for the purpose of hearing appeals, S. R. Lysaght (hereinafter called "the appellant") appealed against a decision of the Commissioners of Inland Revenue on the question of his ordinary residence arising under s. 46 of the Income Tax Act, 1918, in respect of his claim to exemption from income tax on British Government securities and also against a decision of those Commissioners on the question of his residence arising under r. 2 (*d*) of the General Rules applicable to Sch. C of the same Act in respect to his claim to repayment of income tax on income from foreign and colonial Government securities. Both these claims were for the two fiscal years ended April 5, 1923, and April 5, 1924, respectively.

The following facts were admitted or proved in evidence before the Commissioners:—

(1.) The appellant was born in England of Irish parents.

(2.) He was engaged from the age of twenty-one in his uncle's business in England, which was subsequently turned into a limited company called John Lysaght, Ld. (hereinafter referred to as "the company"). He took an active part in the business of the company up to the year 1919, when he held the position of director and managing director. He then partially retired from the business, but retained the post of advisory director at a retaining fee of 1500*l.* a year and director's fees. The company had their principal works at Bristol and Newport.

(3.) For many years up to 1919 the appellant owned a property called Blackwell Down, Flax Bourton, near Bristol, in which he resided with his family. On his partial retirement from the business he sold Blackwell Down, and went to live on a family property, "Hazelwood," Mallow, Ireland, which by arrangement with his uncle he had purchased from his cousin in 1916. He had previously inherited from his father in about 1893 an estate at Newmarket, county Cork, which was afterwards sold to the tenants thereof. The appellant's family went to live permanently at "Hazelwood" immediately the Bristol house was given up in 1919. The appellant himself went to Australia in 1919 for the company, and on his return took a furnished house at Burnham, co. Somerset, England, going backwards and forwards to Ireland until 1920. In 1920 he went to reside at "Hazelwood," and from that time on had no definite place of abode in England.

(4.) The appellant came to England for a meeting of the directors of John Lysaght, Ld., every month, and remained for consultations with the other directors and for committee meetings. The company had a branch business at Scunthorpe, Lincolnshire, and the appellant had visited this business on several occasions during his visits to England. On the occasion of these visits he spent about a week in England. On two occasions his return to Ireland was delayed by illness. The total number of days spent in England in the respective years had been as follows :—

In the year ended April 5, 1923 .	101 days.
,, ,, ,, 1924 .	94 ,,
,, ,, ,, 1925 .	84 ,,
In the period from April 6 till September 25, 1925	48 ,,

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When in England the appellant generally stayed at the Spa Hotel, Bath, at which the meetings of the directors of the company were held. Occasionally he had stayed at his brother's house at Chepstow. These visits to England were solely for business purposes, and on these occasions his wife never accompanied him. He owned a field of about three acres near Burnham, purchased many years ago, which he was anxious to sell. He had a few relatives and many friends in England. He had also relatives and friends abroad.

(5.) He had no business activities in Ireland except the management of his estate at Mallow, of which 800 acres were in hand.

(6.) His banking account was at the Mallow branch of the Bank of Ireland, but he had also a small account at a branch in Bristol of the Westminster Bank. The registered address of his various securities was "Hazelwood," Mallow. He was a member of the Savile Club, London, but hardly ever went there. During the past five years he had made three lengthy trips to Australia and South America on behalf of the company.

It was contended on behalf of the appellant :—

(1.) That for the years in question he was ordinarily resident in the Irish Free State, and was not ordinarily resident in the United Kingdom.

(2.) That though his ordinary residence had been in the United Kingdom, he had left the United Kingdom not merely for the purposes of occasional residence abroad within the meaning of r. 3 of the General Rules applicable to All Schedules.

(3.) That his visits to the United Kingdom were for some temporary purpose only and not with any view or intent of establishing his residence therein, and that he had not spent six months in the United Kingdom in either of the income tax years in question; and

(4.) That he was neither ordinarily resident nor resident in the United Kingdom for either of these years.

It was contended on behalf of the Crown (inter alia) :—

(1.) That though the appellant might be resident and ordinarily resident in the Free State, he was also resident and ordinarily resident in the United Kingdom in the years in question;

(2.) That during each of the years in question the appellant had in fact resided in the United Kingdom and that his visits to the United Kingdom were in accordance with the regular habits of his life, and were therefore not for a temporary purpose within the meaning of r. 2 of the Miscellaneous Rules applicable to Sch. D; and

(3.) That therefore the appellant was for both those years ordinarily resident in the United Kingdom within the meaning of s. 46, sub-s. 1, of the Income Tax Act, 1918, and liable to tax in respect of his income from British Government securities, and was not in the United Kingdom "for some temporary purpose only," so as to relieve him from liability as resident in the United Kingdom in respect of income from foreign or colonial securities.

The Commissioners "held" that the appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ended April 5, 1923, and April 5, 1924, respectively.

Latter K.C. and *S. R. Benson* for the appellant.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the Crown.

ROWLATT J. In this case I will not again draw attention to the difficulties, which I am bound to say I feel are rather great, of determining exactly what "residence" means in all the rules and sections of the Acts, and of clearly seeing what is the state of the man who is described (and under some circumstances a man must be described) as being "resident" and yet not "ordinarily resident." I will not repeat those difficulties, but I will endeavour to deal with this case.

Rule 2 of the Miscellaneous Rules applicable to Sch. D does not apply to this case at all, because it deals only with foreign possessions and securities. It has reference to the case of a taxpayer who has foreign possessions or securities; but, as Mr. Latter has pointed out, its language has at any rate an illustrative value. It brings before one's mind the exception of a man not acquiring a residence by visits for a temporary purpose only, and not with a view of establishing a residence, and so on. I think that is a mode of thought which must be kept in view all the time, although the rule itself does not apply.

There are one or two matters which I think one must put out for consideration in this case. I do not think that the position of this gentleman during the years 1922, 1923 and 1924, which are here in question, must be coloured by a reference to his previous life. The circumstance that he had been an undoubted resident in Bristol or the neighbourhood does not show that he had continued to be so, nor does the circumstance that he had made a great change in his domestic habits necessarily help one in considering whether he had made a change in his residence also, for this purpose. I think one must simply consider him as a gentleman who, one now knows (whatever his past may have been), has his residence in Southern Ireland, and just comes over here. Secondly, one must remember—and it is rather a hard thing to bear in mind, because it qualifies one's natural ideas in connection with the word "residence"—that one must not look for an establishment. As the Lord President in *Reid* v. *Inland Revenue Commissioners* (1) pointed out, a tramp has a "residence" in this country. If a man chooses to live at hotels instead of in his own house, or even to stay with friends, it really does not affect the question of residence. What I really have to decide in this case, and what the Commissioners had to decide—and I have to see whether they were wrong—is whether or not he was a mere visitor. Mr. Latter says his presence here was not in the character of a resident. I think that is a fair way of putting it. It is putting in other words the same idea as is expressed by the words, "for some temporary purpose only, and not with any view or intent of establishing his residence." It is not in the character of a resident, Mr. Latter says, that he was present in this country. This gentleman was not one of the tramp class—using that expression, in this connection, not in an offensive sense but in that which the Lord President indicated—whose whole life was a wandering life. If a man has no home in a real sense, but wanders over the world and spends a large time wandering in this country, it is perhaps easier to hold that he is resident here, because there is so little in the way of competing residence, although no competition is necessary. It cannot be said that one place is so clearly his residence that the other places are not significant. So it is a stronger case in favour of the appellant here, I think, inasmuch as he undoubtedly has a very permanent family home where he mainly lives, in Ireland. Undoubtedly that is in his favour, and it is not as though he merely came over to this country on a series of hotel visits. But what one has to consider, I think, is what was the nature of his stay here, as Mr. Latter said, from a good many points of view. It is not the case, really, of a man who comes as a commercial traveller, quite regularly, for some time, to a place. One has to realize what this gentleman's position really is. Here is the great business, as everybody knows very well, of Lysaght & Co. He is the advisory director of it, at 1500*l.* a year, and he comes over here every month for an average of a week. He sleeps here, and he has to be here doing the business of the company for about a week in every month. It is not to be looked at as if one could say: "He has come; I do not know whether he will come next month; I do not know whether he will come the month after." As things are, rebus sic stantibus, he came this month; he will have to come next month, if illness or something does not prevent him; and he will have to come the month after. He will have to come perfectly regularly and, unless he gives up his position, he could not alter it. He did not come for pleasure; he came in that sort of way; and here he stays for that week. One would think it would require a very energetic man to have his home (if I may use that expression) in Ireland, when he had to do so much work in Bristol, because he has his work in Bristol

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(1) 1926 S. L. T. 365, 368.

—fixed, inevitably recurring, important work; not like a visitor, not like a commercial traveller, not like a barrister on a circuit. He has this fixed call every month, which brings him here for a week. In these circumstances I do not decide more than this particular case—I cannot differ from the Commissioners when they say that he was resident and that the ordinary course of his life made him resident in this country within the section and the rule. This appeal must therefore be dismissed.

I hope that no more appeals of this kind will come before me until some higher Court has given some comprehensive ruling upon the point.

Appeal dismissed.

The appellant appealed. The appeal was heard on February 11, 15 and 17, 1927, immediately after the conclusion of the arguments in *Levene* v. *Inland Revenue Commissioners* (1) and before judgment was delivered in that case.

Latter K.C. and *S. R. Benson* for the appellant. The question in this case is similar to that in *Levene's* case (1), and we rely on the arguments adduced on behalf of the appellant in that case. The present is an a fortiori case. The appellant's home is undoubtedly in the Irish Free State, and he merely comes over to this country every month for the temporary purpose of discharging his duties as advisory director of John Lysaght, Ld. The case is analogous to that of a barrister on circuit, who is still resident in London, although he may regularly attend assizes and sessions at certain towns on his circuit.

[LORD HANWORTH M.R. You may put your case in the words of Lord Shand in *Lloyd* v. *Sulley* (2): "If he had been merely a temporary resident without any characteristic of settled residence about the occupation of his house at Minard, there would have been no responsibility."]

It is admitted that the appellant is under a liability in respect of tax on his salary as director, which has been liquidated in the usual way.

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(1) Ante, p. 38.

(2) (1884) 2 Tax Cas. 37, 45.

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The Commissioners have, it is submitted, misconceived the idea of residence. There is no evidence on which either they or Rowlatt J. could hold that the appellant was "resident" or "ordinarily resident" within this country.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the Crown. We also rely on our arguments adduced by us on behalf of the appellant in *Levene's* case. (1) The onus is on the person seeking to escape from tax to show that he is not "resident" or "ordinarily resident" in the United Kingdom within the meaning of s. 46, sub-s. 1, of the Income Tax Act, 1918, and r. 2 (*d*), of the General Rules applicable to Sch. C, and the appellant here has not discharged that onus. Although he might be resident and ordinarily resident in the Irish Free State, he was also resident in this country in the years in question. His visits to this country were in accordance with his usual habits of life, and were not for a temporary purpose within the meaning of r. 2 of the Miscellaneous Rules applicable to Sch. D.

[They referred to *Attorney-General* v. *Coote* (2); *In re Young* (3); *Rogers* v. *Inland Revenue Commissioners* (4); *Lloyd* v. *Sulley* (5); *Turnbull* v. *Foster* (6); *Cooper* v. *Cadwalader* (7); *Foulsham* v. *Pickles* (8); *Reid* v. *Inland Revenue Commissioners*. (9)]

The de facto presence of the appellant in this country may be material in determining whether he is resident here. It is all a question of degree depending upon the facts of each particular case. Residence in this country is none the less residence here, because it is for a business and not a social purpose.

The Commissioners having found as a fact that the appellant was both "ordinarily resident" and "resident" in the United Kingdom during the years in question, the Court has no jurisdiction to review their finding.

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(1) Ante, p. 38.
(2) (1817) 4 Price, 183.
(3) (1875) 1 Tax Cas. 57.
(4) (1879) 1 Tax Cas. 225.
(5) 2 Tax Cas. 37.
(6) (1904) 6 Tax Cas. 206.
(7) (1904) 5 Tax Cas. 101.
(8) [1925] A. C. 458.
(9) (1926) 10 Tax Cas. 673.

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Latter K.C. in reply. It is said that r. 2 of the Miscellaneous Rules applicable to Sch. D does not apply. It is true that on the face of the rule it applies only to Sch. D, but by s. 39 of the Income Tax Act, 1842, it is extended to possessions in the Dominions and the colonies. It applies equally to Schs. C and D: see s. 208 of the Act of 1918. Rule 2 is of guidance, as pointed out by Lord Shand in *Lloyd* v. *Sulley.* (1)

It is submitted that there is here a set of facts proved, which is inconsistent with the residence of the appellant being in the United Kingdom.

The question of residence is not merely a question of fact; it is a question involving the construction of statutory provisions, and is an appealable point. For that I rely upon s. 27 of the Finance Act, 1924, which shows that in the view of the Legislature an appeal will lie on questions of domicil, residence and ordinary residence. In *Great Western Ry. Co.* v. *Bater* (2) the question what was "an office or employment of profit" arose. The Commissioners found that the defendant held such an office, and in the Court of Appeal both Lord Sterndale M.R. and Scrutton L.J. treated that as a finding of fact on the part of the Commissioners, and refused to interfere with it. But when that case went to the House of Lords (3) the House dissented from that view, and commented upon the way in which the Commissioners in their finding had not differentiated between fact and law, and having construed the relevant statutory provisions, the learned Lords applied them to the facts, and reversed the decisions of the Courts below. Similarly in the present case the facts have to be stated, and then the Court has to decide whether there has been a residing within s. 46 and r. 2 (*d*) of the General Rules applicable to Sch. C. I am bound by the finding of particular facts, but when the meaning of "residence" has to be considered, that is a question of law, and is appealable.

The unappealable point in *De Beers Consolidated Mines,*

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(1) 2 Tax Cas. 37, 43.

(2) [1921] 2 K. B. 128.

(3) [1922] 2 A. C. 1.

Ld. v. *Howe* (1) and *American Thread Co.* v. *Joyce* (2) was the finding of fact with regard to the place where the central management and control of the business were situate. That was a mere question of fact. "There are cases in which it has been judicially decided, and I think rightly, that the words 'residence' and 'business' have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur"; per James L.J. in *Ex parte Breull.* (3) The findings of the Commissioners were not adopted in *Farmer* v. *Cotton's Trustees* (4); *Greenwood* v. *F. L. Smidth & Co.* (5); and *Gas Lighting Improvement Co.* v. *Inland Revenue Commissioners* (6); and the principle of those cases, where questions of fact and law were involved, applies to this case. The meaning of "residence" in any particular statute involves a question of law and of construction, and the word does not necessarily mean the same thing in every statute, or in both s. 46 and r. 2 (*d*) of the General Rules applicable to Sch. C. Under s. 46 the Commissioners should state that the person claiming exemption has not shown in manner directed that he is not ordinarily resident in the United Kingdom, and from that an appeal lies to the Special Commissioners under s. 27 of the Finance Act, 1924, and the issue before them is "ordinarily resident" or not "resident." The Commissioners have not purported in their findings of fact to state the appellant out of Court. The residence must be substantial and continuous, with a house ready all the time: *Cooper* v. *Cadwalader.* (7) It is not enough to come again and again if there is no intention to remain or reside.

Sir Thomas Inskip S.-G. replied on the cases.

Cur. adv. vult.

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(1) [1906] A. C. 455.
(2) (1913) 108 L. T. 353.
(3) (1880) 16 Ch. D. 484, 487.
(4) [1915] A. C. 922.
(5) [1922] 1 A. C. 417.
(6) [1923] A. C. 723.
(7) 5 Tax Cas. 101.

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March 11. The following judgments were delivered :—

LORD HANWORTH M.R. This is an appeal from a judgment of Rowlatt J. dated November 17, 1926, confirming the decision of the Commissioners, that the subject was liable to the assessment made upon him.

The facts are fully stated by the Commissioners. The appellant sold a residence which he had near Bristol and went with his family to live at Mallow—that is not far from a residence in county Cork which he had inherited from his father, but which was sold to the tenants after he had become possessed of it. It is clear upon the facts that, so far as he could do so, he changed his home life from England to Ireland. Since then he has come over to England to attend the monthly board meetings of John Lysaght, Ld. The meetings are held at Bath. He also visits the branch business of the company at Scunthorpe in Lincolnshire. Except for these business visits, he remains in Ireland and looks after his estate there of some 800 acres. The Commissioners find that these visits to England are solely for business purposes ; the appellant's wife never accompanies him.

The case appears to be one analogous to that of the merchant who goes to a place to attend a market regularly as often as that market is held ; to that of the barrister who regularly attends the assizes at a particular town. The reason for the visit of the merchant or barrister is that it is paid to the locality where his business requires him. In the present case, if the board of directors determined to hold their meetings at Bristol or Cardiff or Lincoln, the appellant's visits in England would be paid to one of those towns as readily as to Bath and Scunthorpe. In my judgment a man may come repeatedly to the country and yet not acquire a residence, for he may go to a place to which duty or business calls him, and whither he resorts for such space of time only as that duty calls and compels him to remain, or the business requires his attendance. That is a place which is fixed not by himself alone, but is determined by other considerations than his own desire or volition—a visit to which is necessitated and determined by causes exterior to his mere will, and might have led him somewhere else, if the path of duty had lain in a different direction.

Such visits may have other characteristics, and so justify a finding of a residence in relation to them. But tested by the considerations or factors to which I have made reference in *Levene's* case (1), the present appears to me to fall on the other side of the line.

There remains however the question that has given me some concern—that is, is the matter so much a question of fact that it is not open to this Court to review the decision of the Commissioners? Rowlatt J. in his judgment felt unable to differ from the Commissioners. They have found the facts; but in para. 5 "held" upon those facts that the appellant was both ordinarily resident and resident in the United Kingdom for each of the years in respect of which the claim to exemption arises. They thus applied the law, as they thought it should be interpreted, to the facts they had found.

It is unnecessary to go through the many cases decided on this point, for in the *Great Western Ry. Co.* v. *Bater* (2) Lord Wrenbury states the course to be followed succinctly in a sentence: "It was for the Special Commissioners to find and state all the facts. . . . . It was not for the Court to question those facts in any way. But the question for the Court was whether, upon those facts, Mr. Hall held an office or employment of profit within the meaning of the Act. That is a question of law. What does the Act mean? What is the true construction?" Emphasis is added to the decision of the House that the question before it was one of law and not of fact merely, because of its divergence from the decision of the Court of Appeal, who had decided otherwise. Lord Sterndale (3) had plainly stated in his judgment that the Court of Appeal could not interfere with the result of the facts found.

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(1) Ante, p. 38.

(2) [1922] 2 A. C. 1, 30.

(3) [1921] 2 K. B. 128, 138.

Applying the decision in *Bater's* case (1) in the House of Lords to the present, I am satisfied that this Court can review the result which the Commissioners had held to follow in law upon the facts found. The meaning of "residence" in the Income Tax Act must be a question of law; and upon the facts found by the Commissioners the Courts must determine whether the subject has brought himself within the terms of the exemption in the Act rightly construed.

In my judgment therefore this Court can reconsider the case upon the question of the meaning of "residence" in law, and ought to hold that the facts found do not satisfy that meaning and constitute residence. The result is that the subject is entitled to the exemption claimed. The appeal will be allowed and the Commissioners will be directed to allow the exemption.

SARGANT L.J. In this case the appellant is seeking a relief from taxation similar to that in *Levene* v. *Commissioners of Inland Revenue*. (2) I need not repeat the remarks I have made in that case as to the meaning of the word "resident" and the phrase "ordinarily resident," but I should add that in this case, as in that, I see no reason for drawing any distinction between the word and the phrase. Everything here, as there, has followed an ordinary course.

So far, this case is analogous to the *Levene's* case (2), but the facts here are very different. Here there is the very important distinction that, throughout the whole period during which the appellant is alleged to have been in course of becoming resident in the United Kingdom, he has undoubtedly been keeping up a home in Southern Ireland and residing there in the ordinary sense of the word. His visits to England have been for short periods of a week only in each month, have been for strictly business purposes only, and have not been in the society of his wife. They have for the most part been to Bath and Bristol, but have sometimes extended to Scunthorpe when the exigencies of business have rendered this further journey necessary or advisable. There

(1) [1922] 2 A. C. 1.

(2) Ante, p. 38.

has been no choice by him of England as a desirable abode, and no intention of being present here otherwise than in the course of his duties; and no one could, I think, predicate of the appellant with accuracy that he ever had the intention of making England his home in any ordinary sense of the word. It is of course possible that a man may have two residences during the same period of assessment, but it is far less likely that he should have a second residence here when he, throughout and apart from temporary absences, is continuously residing and keeping a continuous home elsewhere.

I put the case during the argument of a man living in a house or lodgings at some such place as Richmond or Reigate and travelling to the City every weekday to earn his living there. In such a case every one would say that he resided at the place where he slept and that he worked or earned his living in the City; and I think that this would be so though his tenure of his office in the City might be much more permanent than that of his house or lodgings in the country, or though he might arrange to sleep in town occasionally when he was kept specially late at work. One element in arriving at this conclusion would be that residence would ordinarily be determined by the place where he slept, not where he worked, but another element would, I think, be that the place where he slept and lived would be determined by his own choice and in view of the social amenities he might expect to enjoy in that district, while the place where he worked would be much less dependent on his own volition and independent of social considerations. But be this as it may, he would in ordinary language be said to be resident in Richmond or Reigate and not to be resident in the City, though a greater part of his waking hours were passed in the City than in his suburb.

In the present case, owing to the greater distance between his home and the scene of his work, the appellant is forced to remain in the United Kingdom for several days and nights continuously. But, on the other hand, the periods during which he is at his home in Southern Ireland are far longer, Sargant L.J.

and I think that in this case, at least, as much as in the hypothetical case of the City worker, the appellant would be considered in ordinary parlance to have his residence at his home in Southern Ireland, and not to have a second residence in the United Kingdom by reason of his recurrent occupational presence there. Further, the purpose of the presence of the appellant in the United Kingdom may, in my view, be fairly described as "temporary," notwithstanding its being of a regular recurrent character, and it certainly has not been with any "view or intent of establishing his residence therein"; and thus he appears to fall within the exemption granted by r. 2 of the Miscellaneous Rules applicable to Sch. D.

Accordingly, with great respect to the learned judge, I differ in this case from the result at which he and the Special Commissioners have arrived, and think that the appeal to this Court should succeed.

In doing so I do not think that I am differing from the Special Commissioners on any question of fact. As I read their decision they have carefully found the facts, and have segregated them from any question of law; and the facts so found I entirely accept. But they have then gone on to decide a question of law on those facts, and have "held" that on the facts found the appellant resided in the United Kingdom. This is a conclusion of law within the principles of Lord Wrenbury's reasoning in *Great Western Ry. Co.* v. *Bater* (1); and it is solely as to this conclusion of law that I differ from them and from Rowlatt J.

LAWRENCE L.J. In this case I have the misfortune to differ from my colleagues, and I need hardly say that in view of the judgments which have just been delivered I profoundly distrust my own opinion.

The appellant claims exemption from income tax on British Government securities under s. 46 of the Income Tax Act, 1918, and repayment of income tax on foreign and Dominion Government securities under r. 2 (*d*) of the

(1) [1922] 2 A. C. 1, 30.

General Rules applicable to Sch. C of the same Act; both these claims are in respect of the two fiscal years ending April 5, 1923, and April 5, 1924, respectively.

In order to succeed in these claims the appellant has to prove to the satisfaction of the Commissioners of Inland Revenue that during the years in question he was neither resident nor ordinarily resident in the United Kingdom.

The Commissioners for the Special Purposes of the Income Tax Acts having held that the appellant was both resident and ordinarily resident in the United Kingdom in each of the two years in question, the appellant required them to state a case for the opinion of the High Court.

In the Case the Special Commissioners, after setting out the facts and the contentions of the parties, state their conclusions as follows: "We held that the appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ending the 5th April, 1923, and the 5th April, 1924, respectively."

I have found some difficulty in reconciling the various decisions and judicial dicta (which will be found conveniently catalogued in Dowell's Income Tax Laws, 9th ed., pp. 231–236) on the question how the Court ought to deal with a case stated for its opinion in the form adopted in the present case.

The Solicitor-General contended that as the appellant had not shown that the Commissioners had taken an erroneous view of the construction of the Act, no question of law had arisen, and, further, that as there was evidence upon which the Commissioners could have reached their conclusions, there was no jurisdiction to review their findings of fact that the appellant was resident and ordinarily resident in the United Kingdom. This contention finds support in many judicial utterances, including the speech by Earl Loreburn L.C. in *Farmer* v. *Cotton's Trustees* (1), where it is stated that the Commissioners' determination is conclusive unless erroneous in point of law, and that there is no jurisdiction to review it upon any issue of fact, but that the Court could interfere

(1) [1915] A. C. 922, 930.

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if it were clear that the Commissioners had proceeded upon a wrong construction of the Act, or if there were no evidence upon which their decision could be supported.

Mr. Latter on the other hand contended that the question whether the appellant was resident or ordinarily resident in the United Kingdom in any given period within the meaning of the relevant section and rule was a mixed question of fact and law, the question of fact being moreover a compound fact (to use the expression of Jessel M.R. in *Erichsen* v. *Last* (1)), depending upon the true effect of a number of instances, and that it is for the Court to decide as a matter of law whether upon a consideration of the facts found in the case the appellant was or was not resident or ordinarily resident in the United Kingdom during the periods in question. This contention also finds support in many judicial utterances, including the speech by Lord Parker of Waddington in the same case of *Farmer* v. *Cotton's Trustees* (2), where the following passage occurs: "The views from time to time expressed in this House have been far from unanimous, but in my humble judgment, where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."

In the present case Rowlatt J. went into the facts, which were stated in the Case to have been admitted or proved before the Commissioners, and directed his mind to the point whether the Commissioners were right in law in holding that the appellant was resident and ordinarily resident in the United Kingdom. The course so taken by the learned judge is in accordance with that adopted by all the Courts in *American Thread Co.* v. *Joyce* (3), and in other cases, and is in my opinion the right method of dealing with the present case, as it is hardly to be supposed that the Commissioners intended to state the appellant out of Court, especially as they were careful in stating their conclusion to use the words "we held" and not "we found as a fact."

(1) (1881) 8 Q. B. D. 414, 416.

(2) [1915] A. C. 922, 932.

(3) (1912) 6 Tax Cas. 1; (1913) Ibid. 163.

In these circumstances I am of opinion that the question for this Court is whether upon the facts stated in the case the Commissioners and the learned judge were right in law in holding that the appellant was resident and ordinarily resident in the United Kingdom within the true meaning of the section and rule in question, and I propose to confine my judgment to this point.

The words "reside," "resident" and "residence" are flexible terms, and may have different meanings according to the context in which they are used.

Both in s. 46 and in r. 2 (*d*) of Sch. C the expression "resident in the United Kingdom" is used in contrast to "resident out of the United Kingdom"—the section and rule are not concerned with residence at any particular place or places within the United Kingdom. When speaking of a person being resident in a certain country at large as distinguished from being resident at some particular spot or in some particular town, the expression does not in my opinion necessarily connote that the person has a fixed place of abode in the country in which for the time being he is resident. The expression in my opinion bears much the same meaning as in the sentence "during his comparatively short residence in England he was unable to master the English language." That the expression is used in this wide sense is I think confirmed by r. 2 of the Miscellaneous Rules applicable to Sch. D, which exempts a person from the charge to tax under that Schedule as a person residing in the United Kingdom in respect of profits or gains received in respect of possessions or securities out of the United Kingdom, who is in the United Kingdom for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who has not actually resided in the United Kingdom at one time or several times for a period of six months in the whole, but enacts that if any such person resides in the United Kingdom for the aforesaid period he shall be chargeable for that year. This rule (which does not apply to cases under s. 46 or under Sch. C) seems to me to show that but for its provisions a person would or might be chargeable to tax under Sch. D as a person residing in the United Kingdom, although such person were only in the United Kingdom for a temporary purpose and although he actually stayed in the United Kingdom for less than six months, and it further shows that a person actually staying in the United Kingdom for six months is resident therein for the purposes of the charge to tax under Sch. D, although he is only staying therein for a temporary purpose and not with any intention of making his home therein.

Whether a person is resident in the United Kingdom within the meaning of the enactments in question in the present case is no doubt a question of degree, and depends on a due consideration of all the facts, but in my opinion a person who regularly comes to, and stays for a substantial period in, the United Kingdom is prima facie resident therein within the meaning of these enactments, although he may not have any fixed place of abode therein, and the onus is upon him to satisfy the Commissioners or the Court that he is not so resident.

The expression "ordinarily resident in the United Kingdom" in s. 46 necessarily bears a narrower meaning than the expression "resident in the United Kingdom" in r. 2 (*d*). It assumes that the person is resident in the United Kingdom, but contemplates that he may not be "ordinarily" resident therein. I agree with the opinion expressed by the Lord President in *Reid* v. *Inland Revenue Commissioners* (1) and by Rowlatt J. in *Levene's* case (2), as to the meaning of the qualifying adverb "ordinarily," which in my opinion is used in its primary and natural sense of "in conformity with rule or established custom or practice" or "as a matter of regular practice or occurrence." In this sense "ordinarily" is in contrast with "casual" or "occasional," and I did not understand Mr. Latter to quarrel with this construction.

I now come to consider whether the facts stated in the case justify the conclusion reached by the Special Commissioners and by Rowlatt J.

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(1) 10 Tax Cas. 673.

(2) Ante, p. 38.

The appellant has his home in Ireland, where he resides with his family when in Ireland, he has no dwelling-house in the United Kingdom, and generally stays at the Spa Hotel, Bath, when he comes to England. These facts, although important, are not conclusive. The Act itself contemplates that a person may be resident and ordinarily resident in more places than one: see, e.g., r. 4 of the Miscellaneous Rules applicable to Sch. D. As regards staying at the Spa Hotel I have already expressed my opinion that in order to be resident in the United Kingdom within the meaning of the section and rule it is not essential that a person should have a fixed place of abode or an intention of making his home therein. At the present time, owing to various causes, even persons who admittedly are permanently resident in the United Kingdom frequently live altogether in hotels or boarding houses and move about from place to place.

On the other hand the appellant is in the regular employ of John Lysaght, Ld., as advisory director at a fixed salary. The head office and works of John Lysaght, Ld., are in England, and the appellant's employment necessitates his regular presence in England for about one week in every month of the year. Further the appellant has a banking account at a bank in Bristol and is a member of the Savile Club in London.

The case is near the line, but in my opinion the determining factor is that the post which the appellant holds in John Lysaght, Ld., causes him to come regularly to England and to stay in the United Kingdom for a substantial period in each year. The fact that the appellant stays regularly in England for about three months of the year for the discharge of his duties as the servant of an English company in my opinion constitutes him a person who is both resident and ordinarily resident in the United Kingdom.

In these circumstances I find myself unable to hold that the Commissioners were bound as a matter of law to be satisfied that the appellant was neither resident nor ordinarily resident in the United Kingdom for the years in question.

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In my opinion the decision of Rowlatt J. was right, and the appeal ought to be dismissed, but as my colleagues take the contrary view the appeal will be allowed.

Appeal allowed.

Solicitors for appellant: *Whites & Co., for Clarke, Sons & Press, Bristol.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

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[IN THE COURT OF APPEAL.]

RICHARDS *v.* PRYSE.

Landlord and Tenant—Agricultural Holding—Compensation—Sale of Holding—Notice to quit—Termination of Tenancy—Completion of Purchase—Liability for Compensation—" Landlord "—" Person entitled to receive Rents and Profits "—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *ss.* 12, 57.

By s. 12, sub-s. 1, of the Agricultural Holdings Act, 1923, where the tenancy of a holding terminates by a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless the notice to quit states that it is given for one or more of certain specified reasons, " compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section." By s. 57 of the Act " 'landlord' means any person for the time being entitled to receive the rents and profits of any land."

In July, 1924, the owner of an estate, which included a farm in the occupation of tenants, agreed to sell the farm to a purchaser who agreed to pay the purchase money on October 27, 1924. The agreement was subject to conditions of sale by one of which the purchaser agreed to pay the balance of the purchase money on the day named in the contract, and in that respect time was to be of the essence of the contract; and it was further agreed that " all rents and periodical outgoings " should be " apportioned up to the completion," and added to or deducted from the purchase money as the case might require. On September 23, 1924. notice was given to the tenants to quit the farm on September 29, 1925, The purchase was not in fact completed until October 6, 1925.

The Court being of opinion that " completion " in the condition of sale meant actual completion, and not the date named for completion:—

Held, that on September 29, 1925, the vendor was the " person entitled to receive the rents and profits " of the farm within the meaning of

s. 57 of the Act, and that therefore he and not the purchaser was the "landlord" within the meaning of s. 12 and the person to pay compensation to the tenants.

The judgment of Bankes L.J. in *Bradshaw* v. *Bird* [1920] 3 K. B. 144, is not to be taken as an authority that a purchaser under a contract fixing a date for completion is, after that date and before actual completion of the purchase, during which time he is by the contract entitled to the rents and profits of the land, the "landlord" within the meaning of s. 12.

APPEAL from the decision of the judge of the county court of Cardiganshire holden at Aberystwith upon a case stated under s. 10 of Sch. II. to the Agricultural Holdings Act, 1923.

By an agreement in writing dated October 18, 1910, made between Sir Edward John Webley-Parry-Pryse, Baronet (the then tenant for life of the Gogerddan Estate, who was later succeeded by Sir Lewes Thomas Loveden Pryse, Baronet, the respondent to this appeal), of the one part and John Richards one of the appellants of the other part the said John Richards became tenant of a farm, part of the said estate, known as Tynpynfach at a yearly rent of 69*l.* In 1916 John Llewelyn Richards, the other appellant, son of the said John Richards, became joint tenant with his father upon the terms of the agreement of October 18, 1910.

On July 10, 1924, Sir Lewes Thomas Loveden Pryse, Baronet, who had then become the tenant for life of the estate, agreed to sell to George Cruikshank of Ffynnon Caradog, Bow Street, near Aberystwith in the same county, Esquire, for the sum of 3000*l.* the freehold farm and lands known as Tynpynfach then occupied by John Richards and John Llewelyn Richards his son as yearly tenants. The purchaser agreed to pay the purchase money on October 27, 1924, at such place as the vendor should appoint. The agreement was made subject to certain conditions of sale of lands and hereditaments forming part of the Gogerddan Estate which conditions were to be deemed to be incorporated in the agreement. Annexed to the agreement was a schedule which after describing the parcels contained the words and figures: "Purchase money 3000*l.* Deposit . Balance remaining unpaid 3000*l.* Received the sum of *l.* the above mentioned deposit. Purchasers' solicitors, Smith, Davies & Jessop."

The conditions of sale mentioned in the above agreement provided as follows :—

"2. The purchaser having on the signing of the contract paid to the vendor or his agent the sum named in such contract as deposit and in part payment of his purchase money shall pay the balance of his purchase money on the day and at the place named in the contract at which time and place the purchase shall be completed and in this respect time shall be of the essence of the contract. All rents and periodical outgoings shall be apportioned up to the completion and added to or deducted from the purchase money as the case may require." The agreement contained no provision for the payment of interest on the balance of the purchase money in default of completion on the stipulated date ; nor did it provide for the payment of any deposit, and in fact no deposit was paid when it was signed, but subsequently, on January 22, 1925, the purchaser paid a deposit of 300*l.* on account of the purchase money.

On September 23, 1924, Sir L. T. L. Pryse, the vendor, gave the tenants notice in writing to quit the holding on September 29, 1925. At the foot of the notice was a memorandum signed by the purchaser to the effect that the notice was given at his request and that, in so far as he was interested in the property, he confirmed the notice.

On September 15, 1925, a conveyance by the said Sir L. T. L. Pryse as tenant for life under the Settled Land Acts to the said G. Cruikshank of the farm lands and hereditaments, with certain reservations, was executed. The purchase, however, was not completed until after September 29, nor apparently before October 6, 1925.

On November 25, 1925, the tenants, who had previously given notice of their intention to claim compensation for disturbance under s. 12 of the Agricultural Holdings Act, 1923, to Sir L. T. L. Pryse and to George Cruikshank, delivered particulars of their claim.

In these circumstances the tenants contended that on September 29, 1925, when their tenancy determined, Sir L. T. L. Pryse was the landlord of the holding within the meaning of the Agricultural Holdings Act, 1923. Sir L. T. L. Pryse contended that George Cruikshank was the landlord on that date.

Upon a special case stated for the opinion of the county court judge the question was whether the said Sir L. T. L. Pryse, Baronet, or the said George Cruikshank was the landlord of the said premises within the meaning of the Act on the determination of the tenancy on September 29, 1925.

The deputy county court judge delivered his opinion as follows: "It is found that on the determination of the tenancy on September 29, 1925, there was in existence a valid contract of sale to George Cruikshank which had been entered into in July, 1924. The date fixed by the contract for completion of the purchase was October 27, 1924, but the actual completion took place after September 29, 1925, on which latter date the tenancy was determined. Prima facie therefore the purchaser would be entitled to the rents and profits as from the date fixed for completion of the purchase. It was contended that on the true construction of the contract another date was agreed upon as the date from which the purchaser was to be entitled to receive the rents and profits—namely, the date of actual completion, which the arbitrator has found was after the date of the determination of the tenancy. This contention was founded upon the term in the conditions of sale: 'All rents and periodical payments shall be apportioned up to the completion and added to or deducted from the purchase money as the case may require.' These are the concluding words of one of the conditions of sale which provide that the purchaser shall pay the balance of the purchase money on the day and at the place named in the contract at which time and place the purchase shall be completed and in this respect time shall be of the essence of the contract. I hold that, when it is said in the same condition that all rents and periodical outgoings shall be apportioned up to the completion and added to or deducted from the purchase money as the case may require, the words 'the completion' mean the date agreed upon in the contract for completion and not a later date when actual completion was made; and consequently when the tenancy was determined on September 29, 1925, the person entitled to the rents and profits was George Cruikshank according to the definition of 'landlord' in the Agricultural Holdings Act, 1923."

The tenants appealed on various grounds, the only one material to this report being, that the learned deputy judge was wrong in law in deciding that the respondent George Cruikshank was at the determination of the said tenancy or at any material time the landlord of the said holding within the meaning of the Agricultural Holdings Act, 1923.

Sir Thomas R. Hughes K.C. and *W. Hanbury Aggs* for the appellants. The question is what is meant by a "person entitled to receive the rents and profits" of an agricultural holding. In an Act dealing with compensation payable to a tenant those words must mean the person who as between himself and the tenant is entitled to receive the rents and profits. No arrangement which that person may have made between himself and a third person can affect the tenant unless it amounts to an assignment of the reversion. It may be that a lessor when he receives the rents and profits holds them as trustee for another, or that he has agreed to pay them to another who has agreed to purchase the land. But with these arrangements the tenant is not concerned. So far as he, the land, and the landlord are concerned the landlord is the person entitled to receive the rents and profits of the land, and no one else until there has been an actual conveyance of the reversion and, in case of a sale and purchase, actual payment of the purchase money: *Phillips* v. *Silvester*. (1) Secondly, the landlord who is to pay compensation is the person entitled to receive the rents and profits of the land at the termination of the tenancy:

(1) (1872) L. R. 8 Ch. 173, 176–7.

Bradshaw v. Bird (1); *Dale* v. *Hatfield Chase Corporation* (2); *Tombs* v. *Turvey*. (3) In the two former cases, where the purchase was completed before the termination of the tenancy, it was held that the purchaser was the landlord to pay compensation. In the last named case the purchase was completed after the termination of the tenancy, and it was held that the vendor was the person to pay compensation. The question is in each case who is, as between the tenant and his landlord, the legal owner of the reversion. Expressions, if any, to the contrary in *Bradshaw* v. *Bird* (1) were unnecessary to the decision, for there the person held to be the landlord was legally entitled. In the present case the sale and purchase was not completed until October 6, 1925, after the termination of the tenancy which ended on September 29. It follows that the respondent, the vendor, was on that date still the legal owner of the reversion and therefore the "landlord" within the meaning of ss. 12 and 57 of the Act.

But even if the expression "landlord" were held to include a person beneficially entitled, or a person entitled as between himself and the legal owner of the reversion, to receive the rents and profits; for example, a purchaser after the date named in the contract from and after which he is to receive the rents and profits; the respondent would still be the "landlord" in this case, because by the contract of sale which embodied the conditions of sale, and particularly condition 2, the purchaser was not to be entitled to the rents and profits until "the completion," and that did not take place until after the tenancy had determined. This is not an unusual form of condition: Key & Elphinstone's Precedents, 12th ed. (1926), vol. i., Pt. 1, p. 269.

[Sect. 10 of the Conveyancing Act, 1881, was also referred to.]

Gerald Hurst K.C. and *Swords* for the respondent. It is a well established principle that by a contract for the sale of real property the purchaser, unless the contract otherwise provides, becomes entitled to receive the rents and profits

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(1) [1920] 3 K. B. 144.
(2) [1922] 2 K. B. 282.
(3) (1923) 93 L. J. (K. B.) 785.

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of the land from the date named in the contract for completion of the sale. And he becomes so entitled not merely as party to a contract; where the contract is one which may be specifically enforced, the vendor becomes a trustee for the purchaser from the date fixed for completion until actual completion: *Plews* v. *Samuel* (1) following *Phillips* v. *Silvester* (2) and *Lysaght* v. *Edwards* (3); for in cases of this kind "Equity considers that as done which is contracted to be done, and, in the absence of something special to control the rule, gives the profits of the thing sold to the purchaser from the time fixed for the completion of the contract, and interest on the purchase money to the vendor from the same time": per Wigram V.-C., *Monro* v. *Taylor* (4); and see Fry on Specific Performance, 6th ed. (1921), p. 641, s. 1402. The Legislature having this well known rule in mind must have intended to include a purchaser when they spoke of "any person . . . . entitled to receive the rents and profits" of the land.

[SCRUTTON L.J. referred to *Champernowne* v. *Brooke* (5) and *Brooke* v. *Champernowne*. (6)]

In that case it was held that the contract contained something special to control the ordinary rule; but that is not so here. The contract in this case distinctly provided that the purchase money should be paid on October 27, 1924. The condition of sale numbered 2 provided that the purchase should be completed on that date, and that in this respect time should be of the essence of the contract. When it subsequently speaks of "the completion" it must surely be taken to mean October 27, 1924.

Counsel were not called upon in reply.

BANKES L.J. This is an appeal from the judge of the Aberystwith County Court upon a case stated under the Agricultural Holdings Act raising the question who in all the circumstances of the case was the person liable to pay compensation claimed by the tenants whose tenancy of a

(1) [1904] 1 Ch. 464.
(2) L. R. 8 Ch. 173.
(3) (1876) 2 Ch. D. 499.
(4) (1850) 8 Hare, 51, 70.
(5) (1835) 3 Cl. & F. 4.
(6) (1837) 4 Cl. & F. 589.

holding had been determined by notice to quit. We have decided one branch of the case already and need not refer to it beyond saying that in our judgment the tenants held as joint tenants under a parol demise the terms of which were originally embodied in a written agreement between one of them and the landlord, the then owner of the estate.

To indicate the question which the Court has to decide it is necessary to state the following dates. On July 10, 1924, the same owner agreed to sell the estate by an agreement which provided that the purchase money should be paid in one sum on October 27, 1924. On September 23, 1924, notice to quit was given to these tenants expiring on September 29, 1925. The purchase was not in fact completed till October 6, 1925. The question which the arbitrator has submitted is whether the vendor or the purchaser was on September 29, 1925, the "landlord" of these tenants within the meaning of the Act. A somewhat similar question has come before the Court in three former cases, and it is only necessary to refer to s. 11 of the Act of 1908 in order to show how doubtful is the position in which the Legislature has placed the parties by defining "landlord" as "any person for the time being entitled to receive the rents and profits of any land." In *Dale* v. *Hatfield Chase Corporation* (1) Scrutton L.J. pointed out that there were three cases in which the tenant was entitled to further compensation for loss or expense directly attributable to his quitting the holding, and he stated the various conditions precedent to the tenant's right to recover the compensation and the events which bring the section into operation. That passage in the judgment shows that at various times four different persons may answer the description of "landlord"; first, the one who gives the notice to quit; second, the one who receives the tenant's notice of intention to claim compensation; third, the one to receive the notice of actual claim; and fourth, the one who is to be given an opportunity of valuing the goods, implements, or stock on the sale or removal of which the tenant claims compensation. It is easy to see the difficulties in which a tenant may find himself in consequence of dealings, of which he may know nothing, between the person who was his landlord and subsequent purchasers of the land or of interests more or less substantial therein. One of these doubts has been solved by the passing of s. 57, sub-s. 2, of the Act of 1923, which protects a tenant, who has instituted proceedings for compensation, from being prejudiced by a change of ownership pending the proceedings. The case of *Bradshaw* v. *Bird* (1) raised the question who was the landlord in the circumstances of that case. The owner of the property had agreed to sell it and gave the tenant a notice to quit expiring on September 29, 1918. On a date after the date named in the contract for completion of the purchase but before actual completion, the tenant gave the purchaser notice of his intention to claim compensation. The claim was made after the purchase was completed. The judgment of the county court judge in that case raised two questions: who was the landlord at the time when the compensation became payable, and secondly, who was the landlord when the notice of intention to claim compensation was made. The only question which seems to have been argued in this Court was whether the person liable to pay compensation, as being the "landlord" within the meaning of the statute, was the original landlord who served the notice to quit or the purchaser whose purchase had been completed at the time when the claim for compensation was made. The Court decided that in those circumstances the purchaser was the "landlord," an inevitable decision, as it seems to me, inasmuch as he was the person legally and equitably entitled to receive the rents and profits of the land. But I did in my judgment refer to the question who was the landlord at the time when the notice of intention to claim compensation was given; and I intimated that the purchaser might be the landlord at that time, as being the person entitled to receive the rents and profits. But when notice of intention to claim was given in that case the purchaser was only entitled in equity. Now this Court is

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(1) [1922] 2 K. B. 282, 296.

(1) [1920] 3 K. B. 144.

not going to decide whether that case is an authority that a purchaser under a contract which fixes a date for completion is, after that date and before actual completion, during which time he is usually in equity entitled to receive the rents and profits, a "landlord" within the meaning of this Act; or whether my judgment ought to be considered as obiter dictum on this point; because after the discussion which has taken place in the present case it is obvious that the definition of "landlord" raises many difficulties, and it is to be hoped that the Legislature, which has cleared up one difficulty in the way of a tenant by passing s. 57, sub-s. 4, of the Act of 1923, will give some similar direction more clearly defining the person from whom the tenant is entitled to claim compensation, by stating, for instance, whether the person entitled to receive the rents and profits includes only the person legally entitled or also includes a person equitably entitled or a person entitled by virtue of s. 10 of the Conveyancing Act, 1881. And unless and until the Legislature by statute or the House of Lords by a final decision clears away the doubt, vendors and purchasers should be careful to define as between themselves which of them is the person to pay compensation to tenants.

The present case, however, can be decided upon a short point of construction. No doubt, in the absence of a stipulation to the contrary, a purchaser is from the date fixed for completion, entitled in equity to the rents and profits of the property which he purchases. But this prima facie position may be altered by contract, and the tenant contends that the vendor and purchaser have in this case expressly contracted that the purchaser shall not be entitled even in equity to the rents and profits of this property until actual completion of the purchase, which did not take place until after the tenancy had expired and after the claim for compensation accrued, and consequently that the purchaser was in no sense entitled to the rents and profits of the land and therefore was not the "landlord." It appears that this farm was part of an estate which was in process of being disposed of; printed forms of agreement for sale of the

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various lots and conditions of sale had been prepared, providing for payment of a deposit in part payment of the purchase money. From the form of contract used in this case all words referring to the payment of a deposit and of any balance of purchase money had been struck out, and the contract read: "The purchaser shall pay the said purchase money on October 27, 1924, at such place as the vendor shall appoint." The conditions of sale, upon which this point of construction turns, provided that the balance of the purchase money should be paid on the day and at the place named in the contract at which time and place the contract should be completed, and in that respect time was to be of the essence of the contract. The condition proceeded: "All rents and periodical outgoings shall be apportioned up to the completion and added to or deducted from the purchase money as the case may require." It is noticeable that this condition, upon which everything turns, contains no provision for the payment of interest on the purchase money.

Now Mr. Hurst contends that in this condition the words "apportioned up to completion" should be read as "apportioned up to the date fixed for completion"; because, as I understand his argument, the condition refers to a date for completion—namely, that expressly named in the contract, October 27, 1924. I cannot assent to that contention. In my opinion the words "up to completion" do not refer to the date to be named for completion, but refer to actual completion. This is the sense in which the words are used in other clauses of the conditions of sale; particularly in clause 4, where the word can only mean actual completion; clause 6, referring to the discharge of mortgages, and clause 16, to the payment of costs. Therefore upon the true construction of these conditions I am of opinion that the parties intended that the rents and profits should be apportioned from the date of actual completion and not before that date, and consequently that at the termination of the tenancy the purchaser was neither legally nor equitably entitled to receive the rents and profits of the land, and was therefore not the "landlord" within the meaning of the Act. For these reasons the appeal must be allowed and the question must be answered thus: that the vendor and not the purchaser was the landlord.

SCRUTTON L.J. This case comes before the Court on a special case stated under the Agricultural Holdings Act, 1923. The tenants are claiming compensation on the termination of their tenancy; the person who ought to pay the compensation is their landlord, and one of the questions raised by the special case is, who was the landlord at the termination of the tenancy? That question turns on the meaning of the definition of "landlord" in s. 57 of the Act as "any person for the time being entitled to receive the rents and profits of any land." It is not clear what this definition means, and some day the question will arise for decision who is the landlord when he who was the landlord has sold the reversion to a purchaser and the purchase has not been in fact completed but the purchaser is beneficially entitled to the rents and profits of the land while the vendor still has the legal title, because the purchase has not been completed by conveyance and payment of the purchase money. We are not deciding that question in this case. This is the fourth time we have refrained from deciding it. When it becomes necessary to decide it no doubt the Court will consider on the one hand Lord Cottenham's words in *Tasker* v. *Small* (1) where, in speaking of the rule that by a contract of purchase the purchaser becomes in equity the owner of the property, he says: "This rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property." And on the other hand the Court will have to consider the case of *Allen* v. *Inland Revenue Commissioners* (2) where, in construing almost the same words in an Act imposing a duty on undeveloped land, the Court of Appeal decided that a person who had contracted to purchase land, but had not yet got a conveyance, was the person entitled to the rents and profits of the land. The Court will then have to choose between those two authorities. But it need not make that choice until a case comes before it where the purchaser under a contract, who has not yet got a conveyance, is entitled to receive the rents and profits at the termination of the tenancy. Where by the terms of the contract the purchaser is not entitled to the rents and profits until actual completion of the purchase and actual completion takes place after the termination of the tenancy, the question whether the person legally or the person beneficially entitled to receive the rents and profits is the landlord does not arise, because then the purchaser is not at the termination of the tenancy entitled even beneficially to receive the rents and profits of the land. In the present case the vendor sold the land for a price; completion was to take place on October 27, 1924; one of the conditions of sale was that all rents and periodical outgoings should be apportioned up to—not the date fixed for completion—but "up to the completion," and should be added to or deducted from the purchase money, as the case might require. There was no provision about interest. The contract for sale was not in fact completed for nearly a year after the date named for completion and about a fortnight after the end of the tenancy. When it was completed no interest was claimed for the delay. One half year's rent, which fell due between the date named for completion and the actual completion, was paid by the tenant to the solicitors acting for both vendor and purchaser and was paid by them to the vendor. A second half year's rent was offered by the tenant but refused by the purchaser, and was left to stand over until the liability for compensation was ascertained.

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(1) (1837) 3 My. & Cr. 63, 70.

(2) [1914] 2 K. B. 327.

In these circumstances was the purchaser a person entitled to receive the rents and profits of the land at the termination of the tenancy? That question turns upon the meaning of the condition that "All rents and periodical outgoings shall be apportioned up to the completion," and particularly upon the meaning of the words "the completion"; and whether they mean the date fixed by the contract for completion or the date of actual completion. In my opinion the words mean the date of actual completion, and I am confirmed in this view by the words of Lord Cottenham in *Brooke* v. *Champernowne*. (1) In that case also, in this respect resembling the present case, the contract of sale contained no express provision about interest on the balance of the purchase money; there was a provision that Champernowne, the purchaser, should be entitled to the rents and profits of the premises from May 1, the date named in the contract for payment of the purchase money, or from such time as the purchase should be completed (2), and the purchase was not completed for some years after May 1. In that state of things Lord Cottenham said: "My Lords, one cannot feel much doubt of the effect of this contract, however injudicious it may have been, which has taken this case out of the ordinary rule that the vendor is entitled to the interest, and the purchaser to the rents of the estates. The parties here have thought proper to stipulate among themselves that the rents should be the property of the purchaser only from the time the purchase was completed"—that is to say the Lord Chancellor construed the word "completed" as meaning "actually completed," and not as meaning "to be completed by the terms of the contract"—"There is," he continued, "nothing said in terms as to the interest on the rest of the purchase money, but it necessarily follows, from the reservation of the rents to the vendor, that the purchaser was not to be called on to pay interest upon the purchase money." This latter sentence only expresses what Knight Bruce V.-C. intended when, in deciding the rights of the parties to the sale of some slob lands in Chichester harbour, he said the purchaser could not "have both money and mud": see Fry on Specific Performance, 6th ed. (1921), p. 640, s. 1399. I take the same view of the condition of this contract as Lord Cottenham took of the clause in Champernowne's

(1) 4 Cl. & F. 589, 611. (2) See *Champernowne* v. *Brooke*, 3 Cl. & F. 4, 6.

Scrutton L.J.

contract. If that is right it follows that up to actual completion the purchaser in this case was not entitled to the rents and profits, and was therefore not the landlord at the termination of the tenancy. What would have followed if, at the termination of the tenancy, he had been entitled to the rents and profits, as between himself and his vendor, though the contract of purchase and sale had not been then completed, it is not necessary to decide now. It would be of great assistance if the Legislature would solve this doubt as it has already set at rest the doubts mentioned by Bankes L.J. Until this is done vendors and purchasers would do well to make it clear in their contracts which party is to pay compensation to tenants where a claim may be anticipated. For these reasons I agree that the appeal should be allowed, and that the vendor in this case is liable to pay the compensation.

ATKIN L.J. I agree in thinking it most desirable to have it made clear who is the person liable to pay compensation to the tenant and thereby obviate a great deal of litigation which must necessarily follow from the doubtful meaning of the statutory definition of "landlord" as "the person for the time being entitled to receive the rents and profits" of the land. Do those words mean the person entitled to receive the rents and profits as between himself and the tenant, or the person entitled to receive them as between himself and his vendor, a former owner? Do the words include other persons beneficially interested in the rents and profits, a cestui que trust for instance, or an equitable mortgagee? And do they ever include a purchaser under a contract of sale, and, if so, in what circumstances do they include him? I do not propose to try and solve these doubts now; and I do not share in the opinion which has been expressed, that it would be a great advantage to landowners and tenants if this Court should now offer a solution, because, as the question does not arise in the case before us, our dicta would not have the necessary weight for a final decision. Perhaps I may add that there is a proposal on foot for extending compensation to tenants, other than agricultural tenants, in respect of improvements. I cannot refrain from expressing the hope that any proposed legislation should point out as clearly as possible the person who is to pay the compensation and that the definition of that person should as far as possible correspond with the definition of the person liable to pay compensation under the Agricultural Holdings Act.

But the question before us is whether the purchaser in this case was a person entitled to receive the rents and profits of the land. In my opinion he was not. The question depends upon the construction of the contract between Sir Lewes Pryse and Dr. Cruikshank. I accept the view submitted by counsel for the respondent that prima facie after the date fixed for completion the purchaser is the person who is entitled, as against the vendor at any rate, to receive the rents and profits; and that this is the prima facie presumption even though there is no express provision in the contract for the payment of interest on the purchase money. But on the other hand it is open to the parties to make an agreement not in accordance with the ordinary rule. The case of *Brooke* v. *Champernowne* (1) cited by Scrutton L.J. is an instance of such an express stipulation; and the question before us is whether the contract between the vendor and purchaser in this case does not contain such a stipulation. In my opinion it does. There is a clear distinction between the date fixed for completion and the date of actual completion, just as there is often a distinction between the date when a debt is payable and the date when it is paid; and when there is a provision that there shall be an apportionment up to the completion, then if the words are given their natural and plain meaning completion and the date fixed for completion may not coincide. There may be delay on one side or the other, some difficulty over title, or inability to keep an appointment. Completion may be postponed for a week, or a fortnight, or, as in this case, for nearly a year. I can see nothing unnatural in a stipulation,

(1) 4 Cl. & F. 589.

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governing all contracts of sale relating to a particular estate, that, if delay should occur in completing, the rents should belong to the vendor up to actual completion. If there had been a stipulation as to apportionment of interest it might have gone some way to negative this construction of the contract; but here there was none, and there seems to be no reason for refusing to give the words their plain meaning, the result of which is that the vendor should have the rents up to the date when completion actually took place and that the purchaser should have them after that date. The consequence is that the vendor does not establish that the purchaser was at the time when the tenancy terminated the person entitled to receive the rents and profits, and the appeal must therefore be allowed.

Appeal allowed.

Solicitors for appellants: *Ellis & Fairbairn.*
Solicitors for respondent: *Helder, Roberts, Giles & Co.*

W. H. G.

1927
Feb. 18;
March 1.

BRITISH AND NORTH EUROPEAN BANK, LIMITED v. ZALZSTEIN.

[1926. B. 1740.]

Banker—Pass Book—Account overdrawn—Entries by Bank Manager without Authority—Banker's Right to recover.

The defendant was a customer of the plaintiffs, who were bankers. Towards the end of 1923 the defendant's account being overdrawn, the plaintiffs' manager for his own purpose and in order to deceive the auditors placed 2000*l.* to the credit of defendant's account from another source. The account was subsequently debited with a like amount, the credit and debit being thus merely book entries. The defendant knew nothing of these transactions until afterwards, when his account showed an adverse balance of 2392*l.* In an action by the plaintiffs for the recovery of this sum the defendant claimed that the entry of 2000*l.* to his credit was a payment to him and that his overdraft was to that extent liquidated:—

Held, on the facts, that the defendant could not accept the credit without regarding also the debit, and that the plaintiffs were entitled to recover.

In dealings between banker and customer, where it is sought to treat a mere book entry as a payment, some other circumstance must be present and relied upon to enable the customer in whose favour it is made to succeed, either some express previous authority to pay, or a communication of the making of the entry to the customer and an acting upon it by him; there must be, in effect, both a payment by one party and a receipt by the other, or an alteration in the position of the customer in whose favour the book entry was made.

Action tried before Sankey J. under Order xiv., r. 8a.

The plaintiffs claimed 2392*l*., the amount of an overdrawn account. The defendant was a customer of the plaintiffs' bank, and the facts of the case were as follows: Towards the end of 1923, the defendant's account being overdrawn by 2000*l*. in excess of the allowed overdraft, the bank manager transferred to the defendant's account from another source the sum of 2000*l*. This he did without authority from the plaintiffs, and in order to deceive the auditors. He subsequently caused the defendant's account to be debited with the same amount, so that the credit and debit were mere book entries. The defendant knew nothing about these transactions until after the entries had been made, when the account showed as due to the plaintiffs the sum now claimed in the action. The defendant never objected to the accounts as delivered to him, and the plaintiffs knew nothing about these entries at the time they were made.

At the trial the defendant took the point that the credit entry of 2000*l*. by the bank manager was a payment to him by the plaintiffs, and that his overdraft was to that extent liquidated, and that the plaintiffs were not entitled to make the subsequent debit of 2000*l*.

A full statement of the facts and of the points raised and authorities cited in argument will be found below in the judgment.

D. N. Pritt for the plaintiffs.

Hon. S. O. Henn Collins for the defendant.

Cur. adv. vult.

March 1. Sankey J. read the following judgment:—

The plaintiffs claim the sum, subject to adjustment, of 2392*l*. 8*s*. 6*d*., being a balance alleged to be due by the defendant to them in respect of defendant's account with them for money lent, bank charges, and interest—in other words for a sum due in respect of an overdrawn account.

The defendant himself has not paid anything in respect of it and the plaintiffs are entitled to recover unless, as the defendant alleges, the circumstances of the case permit him to say that in law the overdraft has been paid off. Those circumstances are as follows:—

Towards the end of 1923 the defendant had two accounts with the plaintiff bank, being overdrawn on No. 1 account to the extent of 600*l.* and in respect of No. 2 account to the extent of 2300*l.* One Wizotzky had guaranteed the defendant's overdraft up to 2000*l.*, and so the defendant's account was in debit to the extent of 900*l.* in excess of his allowed overdraft. The bank manager, a man of the name of Kiaer, who gave evidence before me which I accept, was anxious about the account, but could not get Wizotzky to put it in credit. He did not want his company or the auditors to see that the account was overdrawn; no doubt he would have been reprimanded if it had come to their notice. He therefore set about to think how he could get the account put in apparent credit. He had at that time a power of attorney of a Mr. Rist, his brother in law, and so in September, 1923, he put 2000*l.* from Rist's account to the apparent credit of defendant's No. 1 account. The result of his so doing was to put that account into apparent credit, while No. 2 account showed a debit of 2260*l.* 19*s.* 6*d.* Subsequently on October 3, 1923, he caused the defendant to be debited in his No. 2 account for that sum, and on October 11 transferred the 2000*l.* apparent credit from No. 1 account to No. 2 account.

The bank manager, in giving evidence before me, frankly admitted that he carried out this manœuvre in order, in his own interest, to deceive the auditors of the bank. He never told any one about it for some time. The defendant never knew about it for weeks afterwards, but in a letter to him dated November 14, 1924, his account was enclosed, showing the book entries above referred to and showing a debit of

300*l.* 0*s.* 7*d.* in respect of No. 1 account and a debit of 2375*l.* 13*s.* 6*d.* in respect of No. 2 account. Subsequently Rist's account was altered by transferring a credit of 2000*l.* to him. The net effect of these transactions was to leave the position of the defendant exactly as it had been. The credit and debit were, without begging the question, mere book entries. The defendant was repeatedly pressed for payment of the overdraft, and copies of the account were sent to him; in fact, as above stated, he himself did nothing to liquidate the overdraft, and at last a writ was issued.

In the proceedings under Order XIV. the defendant filed an affidavit, in which he alleged that his guarantor Wizotzky had paid the sum of 2000*l.* on his behalf, and the case was remitted for trial. Subsequently, as I was informed, the defendant obtained an adjournment in order that he might prove these facts. The adjournment was granted, but he would never have been able to prove such facts, for Wizotzky had never paid at all. All that had taken place had been, as above stated, that certain book entries had been made.

When the matter came before me the defendant was unable to prove that Wizotzky had in fact paid the money, nor was he able himself to go into the witness box, but then for the first time the point was taken for him that he was entitled in law to rely upon the above facts as constituting payment. The way in which the case was put for him was as follows:—

It was said (1.) that when the 2000*l.* was placed to his credit in the way above mentioned the 2000*l.* was a payment to him and became his property, and that his overdraft was liquidated to that extent; (2.) that the bank had no right or authority to make the subsequent debit, and therefore their act in doing so was void, and he was entitled to rely upon the 2000*l.* as a payment to him and to his credit and to disregard the debit.

The question for decision is whether he is so entitled. I was referred on the defendant's behalf to the cases collected in Smith's Leading Cases, 12th ed., vol. ii., p. 403, in the notes to *Marriott* v. *Hampton* (1), with regard to money paid under mistake, and also to *Eyles* v. *Ellis.* (2)

Before discussing the matter it is necessary to find or to emphasize the following facts: The defendant never knew anything about those transactions at the time they took place, and the first time he knew anything about the book entries was after both the credit and debit had been made, and when the account showed the sum (subject to adjustment) now sued for. The defendant never objected to the accounts as delivered to him and never took this point until the hearing of the case. The manager of the bank made the book entries for his own purpose to deceive the auditors. The bank itself knew nothing about these transactions.

Dealing with the law, I am of opinion that the cases which have been decided on mistakes of fact have very little to do with the present case; indeed the defendant contended that there was no mistake here, for the bank manager did what he intended to do and did not do it in consequence of any mistake or misapprehension, the main argument for him being that he was entitled to treat the entry as payment, and he cited the case of *Eyles* v. *Ellis* (3) as being in his favour. In my view that case is wholly distinguishable. There the plaintiff and defendant each kept an account with the same banker. The plaintiff desired the defendant to pay into his account a sum due to him for rent. The defendant wrote stating that he had caused the amount to be transferred to his account, and the banker wrote to the plaintiff to the same effect. At the time the transfer was made in the books of the banker the defendant's account was overdrawn. The bank having stopped payment, it was held that the transfer was equivalent to payment by the defendant to the plaintiff. "Though no money was actually transferred," said Best C.J., "yet as the bankers gave the plaintiff credit for the amount, that was equivalent to an acknowledgment by them that they had received the rent from the defendant on account of the plaintiff. The plaintiff might then have drawn for the sum thus transferred": Hart on Banking, 3rd ed., p. 214.

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(1) (1797) 7 T. R. 269.

(2) (1827) 12 Moo. C. P. & Ex. 306; 4 Bing. 112.

(3) 12 Moo. C. P. & Ex. 306, 307.

It is true that the entries were made by clerks in that case, but it was not suggested that the clerks had no authority to make them, or that they were making them for their own purposes only. In the present case the manager was making the entries in fraud of his employers and for his own purposes.

The law applicable to the subject is in my view rather to be found in that branch which deals with the effect of entries in pass books, and the real question is whether there has been payment in this case.

The present position of the law as to bank pass books is said to be most unsatisfactory: see Paget on Banking, 4th ed., p. 344. I do not think it can be dogmatically asserted that an entry made in a pass book is in all cases conclusive and binding on the bank, or conclusive or binding on the customer, but each case must be judged on its own particular facts, although the customer in whose favour the entry stands starts with the advantage that prima facie it is an admission by the bank in his favour, which cannot in some cases be rebutted.

Bigham J. has said that entries made in a pass book by the bank are "statements on which the customer is entitled to act": *Akrokerri (Atlantic) Mines* v. *Economic Bank.* (1) That may be so in certain events, but if a customer after some months examines his pass book and sees a credit of 2000*l*. and a debit of a similar amount immediately afterwards, and knows nothing about either entry, is he entitled to say, I will act on the credit and disregard the debit? Is he entitled to regard and accept the credit as a payment and to disregard and repudiate the debit? In my opinion he is not. I think too that in every case where it is sought to treat a mere book entry as a payment, some other circumstance must be present and relied upon to enable the customer in whose favour it is made to succeed, either some express previous authority to pay, or some communication of the

(1) [1904] 2 K. B. 465, 470.

making of the entry to the customer and some acting on it by him: *Eyles* v. *Ellis* (1) and *Skyring* v. *Greenwood.* (2)

There must be something in the nature both of a payment by one party and a receipt by the other, or some alteration in his position by the customer in whose favour the book entry was made in order to induce the Court to say that the entry was payment and that the money cannot be recovered from him.

In this case the defendant never knew of the entry or alleged payment until after a debit of a similar amount had been made, and never altered his position because of it. Although it cannot be said that mere acquiescence in the debit entry binds him (*Kepitigalla Rubber Estates* v. *National Bank of India* (3)) there is ground for saying that there was no payment at all in this case: see the observations of Scrutton L.J. in *Holt* v. *Markham.* (4)

I find (1.) that the bank manager never meant the entry to be a payment or to appropriate it as such; (2.) that the defendant himself eventually knew of it and never regarded the entry as a payment.

In these circumstances I am of opinion that the entry was not a payment nor can it be relied upon as such, and the plaintiffs are entitled to judgment.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Guedalla, Jacobson & Spyer.*
Solicitors for defendant: *Stephenson, Harwood & Tatham.*

(1) 12 Moo. C. P. & Ex. 306; 4 Bing. 112.
(2) (1825) 4 B. & C. 281.
(3) [1909] 2 K. B. 1010.
(4) [1923] 1 K. B. 504, 514.

F. P. F.

WALLEMS REDERIJ A./S. *v.* WM. H. MULLER AND COMPANY, BATAVIA.

1927
March 11.

[1924. W. 3899.]

Shipping—Charterparty—Dead Freight—Failure of Charterers to load a full and complete Cargo—Obligation of Shipowners to minimize Damage by shipping other Cargo—Delay thereby caused—Deviation.

Where a charterer undertakes to load a full and complete cargo and fails to perform that duty, the shipowner, acting reasonably and in order to minimize damage, has implied liberty to load other cargo in order to fill up the space in the ship left vacant by the charterer and to delay the charter voyage for the period of time reasonably and necessarily occupied in taking in that substituted cargo.

Charterers agreed by the charterparty to load a full and complete cargo at her ports of loading in Java, but failed to do so. At Alexandria, an intermediate port at which the ship called in order to discharge a portion of her cargo, the shipowners, without asking for or receiving the assent of the charterers, loaded additional cargo and thereby minimized the damages for which the charterers would otherwise be liable. The ship was necessarily detained for a period of five days, during which time the further cargo was being loaded. At the close of the voyage the shipowners sued the charterers to recover dead freight. The charterers by their defence alleged that the ship by loading the additional cargo at Alexandria without their consent and by the consequent delay in her chartered voyage had deviated, and that as a result the shipowner's right to dead freight had been destroyed:—

Held, that inasmuch as the shipowners had an implied right to minimize the damages caused by the charterers' default and to load additional cargo to fill up the space in the ship left vacant by the charterers, the delay occasioned to the voyage by loading that cargo was impliedly authorized by the charterparty, and therefore there had been no deviation.

Action tried before MacKinnon J.

The plaintiffs were the owners of the steamship *Storviken* and the defendants were a trading company with head offices at Batavia.

By a charter party dated July 27, 1922, the vessel was chartered by the plaintiffs to the defendants. Under the terms of the charterparty the *Storviken* was to "proceed to Batavia for orders to load always afloat at not more than four ports in geographical rotation on the north coast of Java . . . ., a full and complete cargo of sugar in bags, viz., not less than 6460 tons net, and not more than 7140 tons net (unless shippers prefer to load more) which the said merchants bind themselves to ship; and being so loaded shall therewith proceed . . . . to Port Said . . . . for orders to discharge always afloat at one, two or three safe ports in the United Kingdom . . . ." The rate of freight varied according to the number of ports at which she discharged; the rate of freight if the vessel discharged at three ports being 34*s.* per ton net. The charterparty contained a provision for demurrage and also the following provision: "The steamer has liberty to deviate and proceed to and from one or more ports or places in Java in any order, whether beyond the ports or places of loading or not, for loading and/or any purposes whatsoever, to sail without pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property."

The vessel went to Batavia for orders and was ordered to Sourabaya, where the charterers loaded on board only 5600 tons of sugar in bags, they being unable to obtain any more cargo. It was agreed at the trial that 5600 tons was not a full and complete cargo of sugar, and that the amount of sugar which the vessel was able to load and which would have constituted a full and complete cargo of sugar was 6850 tons, and that therefore there was a failure by the charterers to load 1250 tons. It was agreed between the parties that the vessel should discharge part of her cargo at Aden, part at Madras, part at Alexandria, and the remainder at Bristol. When it was arranged that part of the cargo should be discharged at Madras it was agreed that it should be treated as one of the safe ports in the United Kingdom. As a result the vessel was discharged at three ports in the United Kingdom or their equivalent and the rate of freight upon the cargo was therefore 34*s.* per ton.

During the loading at Sourabaya when it became evident that the charterers would not be able to load a full cargo, negotiations took place between the charterers and the shipowners with regard to loading further cargo at Madras. The shipowners said that, provided the charterers remained liable for the full amount of dead freight, they would endeavour to procure further cargo at Madras and to share the freight earned in carrying that cargo with the charterers. To this proposal the charterers agreed, although according to English law they would, but for the agreement, have been entitled to the whole and not merely to half of the freight on any cargo shipped at Madras in mitigation of their damages. No cargo however was available at Madras, and the steamship proceeded to Alexandria, where she discharged part of her cargo.

At Alexandria the shipowners had the opportunity to obtain 1000 tons of cottonseed cake as further cargo for carriage to Avonmouth at a freight of 10*s.* 6*d.* per ton. They loaded this amount of cargo without asking for, or obtaining, the assent of the charterers. The loading of this cargo resulted in the steamship being delayed for a period of five days while the loading was proceeding. After paying expenses the carriage of this cargo resulted in a profit of 216*l.* 8*s.* 3*d.*

The plaintiffs claimed to recover dead freight in respect of the difference between a full and complete cargo and 5600 tons, the cargo actually shipped, which difference was agreed at the trial to be 1250 tons, at the rate of 34*s.* per ton less moneys saved to the plaintiffs by not carrying this, and less the 216*l.* 8*s.* 3*d.*

The defendants by their defence alleged that the vessel, by loading the 1000 tons of cottonseed cake at Alexandria, and by the consequent detention during the time occupied in loading, had deviated from the voyage contracted for, and that as a necessary consequence the plaintiffs were not entitled to recover dead freight.

Clement Davies K.C. and *Sir Robert Aske* for the plaintiffs.

D. B. Somervell for the defendants. The plaintiffs are not entitled to the dead freight which they claim by reason of the delay to the voyage caused by the time occupied in loading the additional cargo on the vessel at Alexandria. This is not a case of minimizing damage as there was no duty on the shipowners to minimize damage. By the charterparty the charterers hired the whole ship, they were however unable to load a full and complete cargo, but the shipowners did not treat that failure by the charterers of their contractual obligations as a repudiation of the contract, as the shipowners proceeded to carry out their part of the contract and therefore they have only a right to damages. The shipowners were under an obligation to prosecute the voyage with all speed, but they had power to deviate for the purposes set out in the charterparty; they had however no power to deal with the space in the ship left vacant by the charterers without the charterers' permission. The charterers, if their permission had been asked, might have objected to the cotton cake being loaded at Alexandria on the ground that that cargo might injure the sugar. The question whether, if a charterer, who has contracted to load a full and complete cargo, fails to load such a cargo and to fill up all the available space in the ship, the shipowner can load further cargo in order to fill up that vacant space without obtaining the charterers' permission, is one on which there is no authority. The contention of the charterers in the present case is that such action by the shipowners amounts to an unauthorized deviation. The obligation of the shipowners is to prosecute the voyage without delay, while the charterers' obligation is to pay for the whole of the ship. The shipowners have a right to dead freight in respect of the cargo not loaded by the charterers, but they have no right to fill up those parts of the ship left vacant by the charterers without the consent of the charterers. A. L. Smith L.J. said in *Aitken, Lilburn & Co.* v. *Ernsthausen & Co.* (1) that "the shipowners might do with that vacant space what they liked so long as they did not delay the voyage upon which they had contracted to carry the defendants' goods." The fact that the shipowners had taken an express right to deviate for certain purposes shows that they have no right to deviate for other purposes. A delay in the vessel prosecuting the voyage amounts to a deviation: *James Morrison & Co.* v. *Shaw, Savill & Albion Co.* (2) If there is a deviation the shipowners' right

(1) [1894] 1 Q. B. 773, 782.

(2) [1916] 2 K. B. 783.

to dead freight is destroyed. Deviation prevents the shipowner relying on the exceptions in the charterparty; it puts an end to the charterparty as from the beginning of the voyage: *Internationale Guano en Superphosphaat-Werken* v. *Robert Macandrew & Co.* (1); *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (2)

[MACKINNON J. Could not the shipowners have sued for dead freight as soon as the charterers failed to load a full and complete cargo at the port of loading, as their right of action was then complete, and in an ideal state the action might have been tried long before the voyage was completed?]

The shipowners could not bring their action for dead freight until the termination of the voyage, because the undertaking not to deviate has the effect of a condition precedent which may be broken at any time during the fulfilment of the contract, and if that condition is not complied with, the failure to comply with it displaces the contract, and prevents the contract being put in issue by the shipowners at all. One party to a contract has no right to mitigate the damages arising from the default of the other party to the contract without the consent of that other party when the acts done in mitigation of the damages would interfere with the contractual rights of the other party. In fact the plaintiffs did not load the further cargo at Alexandria in order to mitigate the damages caused by the defendants' default.

Clement Davies K.C. was not heard in reply.

MACKINNON J. In this case the plaintiffs claim dead freight from the defendants; that is to say they claim damages from the defendants for their breach of the charterparty contract in not loading 1250 tons of sugar. [His Lordship stated the facts substantially as set out above and continued:] The defendants set up as a defence that the action of the shipowners in loading the 1000 tons of cargo at Alexandria involved a delay of the ship at that port for some five days during the period of loading, and that that delay constituted a deviation—that is to say, it constituted a breach by the shipowners of their obligation to fulfil the charterparty voyage with all reasonable despatch, and that by reason of that deviation, or radical breach of the charterparty, the shipowners are deprived of the benefit of the terms of the charterparty, and among other things are deprived of their right of action, which had already accrued, to recover damages for the charterers' failure to load the 1250 tons of sugar.

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(1) [1909] 2 K. B. 360.

(2) [1907] 1 K. B. 660.

The defence set up by the defendants is, so far as I know, entirely novel, and at first sight it seems a somewhat bold one. But it has been argued with great ability and with complete logic by Mr. Somervell. For in answer to me he did not shrink from carrying his argument to the point of contending that if, when the vessel left Sourabaya without a full cargo, the plaintiffs had immediately brought an action in respect of their then accrued claim for damages for dead freight, and supposing proceedings in Court could be ideally hastened so that the action came on for trial before the completion of the voyage, it would have been open to the charterers to say as a defence to that action that it had been prematurely brought, inasmuch as the shipowners had no immediate cause of action, and would have none until the termination of the voyage. For deviation would destroy any right of action which the shipowners already had, arising from the failure of the charterers to load a full cargo, so that the shipowners would be deprived of that accrued right of action.

The action of the shipowners in loading the additional cargo at Alexandria, although they may not have so intended at the time, must be taken, I think, as an act done in mitigation of their claim against the charterers for damages for loading a short cargo at Sourabaya. There are certain cases in which it has been said that there is a duty on the shipowner, in cases where he has not been furnished with the contractual cargo by the charterer, to mitigate damages by obtaining other cargo. I doubt whether there is any such duty. The real point arises in this way: supposing a shipowner makes a claim for damages in respect of the total freight of the cargo which the charterer ought to have, but had not, shipped, it is open to the charterer to say in answer to that claim that the true measure of the shipowner's damages is not really the total freight because that amount of pecuniary loss has not in fact been imposed upon the shipowner by the charterer's action or fault, inasmuch as the shipowner could have mitigated that pecuniary loss by carrying other cargo in the space which the charterer left vacant. If the shipowner had loaded that other cargo he would have diminished his damages, or perhaps wiped them out altogether, but he certainly would have diminished them to some extent, and it is only to the limited extent to which the damages have been so diminished that the shipowner has in fact suffered pecuniary loss by the charterer's default. But whether this desirability or duty of loading other cargo for the purpose of filling up space that the charterer has left vacant is or is not to be called an obligation arising under the charterparty, obviously it is a thing which the shipowner is entitled to do, and whether or not he is contractually bound to do it, it is clear that he is, in his own interest, bound to do it, because otherwise he will not be able to recover his full damages.

It is, in my opinion, not necessary in this case to decide various points that are involved in Mr. Somervell's argument. In the first place I will assume, without deciding the point, that the delay of the vessel at Alexandria during the five days while the other cargo was being loaded would, if unauthorized, constitute a deviation, and would have the effects upon the rights of the parties under the charterparty that a deviation has. Secondly, I will assume, although most certainly I do not decide the point, that one of the effects of such a deviation would be to destroy an existing cause of action that had accrued to the owner of the ship which had deviated previous to the deviation taking place. But I think the real question here, and this is the point on which I think Mr. Somervell fails, is whether or not there was a deviation at all in the circumstances of this case.

Deviation, strictly speaking, means a departure from the agreed "via" by which the ship is to carry out the charter voyage. The term has however been extended to include delay in the carrying out of the voyage beyond the agreed period of time within which the parties have stipulated that the voyage shall take place, which is usually the shortest reasonable time in which the voyage can be carried out. In both those cases, namely, in the case of both deviation and delay, the deviation or delay is a breach of that which is expressed or implied in the contract as the route by which, or the period of time within which, the voyage is to be accomplished. But if there is an express liberty in the charterparty for the ship to deviate to certain ports, then the deviation becomes part of the agreed route. So also as regards delay, if there is an express liberty in the charterparty (as there is in this charterparty) to tow vessels in distress, then the time occupied in towing such a vessel, which would obviously be longer than the time occupied in doing the same distance without a vessel in tow, becomes part of the agreed time within which the shipowner stipulates that he shall be allowed to perform the voyage.

Besides the express directions as to route and time contained in any charterparty there may also be implied stipulations. There is, for instance, in every charterparty an implied liberty to deviate for the purpose of saving life where there is not an express liberty to that effect. That must involve the question of delay and an implied liberty to delay the voyage while engaged in the task of saving life. Whether or not it is really proper to speak of this supposed duty of mitigating damages by taking other cargo when a claim for damages has arisen as a contractual duty imposed upon the shipowner, at any rate it is action taken for the benefit of the charterer, because it goes to mitigate the amount of damage that the charterer would otherwise be responsible for by his failure to ship the full cargo.

Applying the principles which were laid down in *The Moorcock* (1) and in similar cases, which one has to apply in order to ascertain whether there is or is not an implied term of the contract, I think that it is an implied term of this and every other charter that if the charterer fails to fulfil his duty in shipping the cargo that he is bound to ship, the shipowner is at liberty to fill up the space in the ship which the charterer has left vacant, if in doing so he is acting reasonably. The best test of the reasonableness of such action by the shipowner is, if to do so will diminish his pecuniary loss arising from the fault of the charterer and so diminish the damages that the charterer will be liable for. If therefore a shipowner, acting reasonably, has implied liberty to take in other cargo to fill up the space in the ship left vacant by the charterer, then he must also have implied liberty to delay the charter voyage by the period of time reasonably and necessarily occupied in taking in that substituted cargo.

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(1) (1889) 14 P. D. 64.

If that be so, and I think that is the true view, there was not, by the delay of this ship for five days at Alexandria in order to take in this cargo, any deviation in the sense of any unauthorized delay in carrying out the voyage, because the delay that took place was only a delay that was authorized by this implied term of the charterparty. In the result I think that Mr. Somervell's point fails, and I hold that there was no deviation. It is therefore not necessary to express any opinion as to what would have been the result of the deviation in the particular circumstances of this case if there had been a deviation.

The defendants are therefore liable for dead freight on 1250 tons at 34*s*. per ton, that is 2125*l*. From that sum certain deductions have to be made, with the result that the plaintiffs are entitled to judgment for 1556*l*.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Richards & Butler.*

R. F. S.

1927
March 31;
April 1, 13.

CARLING *v.* LEBBON.

[1926. C. 3967.]

Damages—Negligence—Action under Lord Campbell's Act—Pension to Widow and Orphans—Whether Pension to be taken into Account in assessing Damages—Widows' Orphans' and Old Age Contributory Pensions Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 70), *ss.* 1, 3—*Fatal Accidents* (*Damages*) *Act,* 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

By the Fatal Accidents (Damages) Act, 1908, s. 1: "In assessing damages in any action . . . . under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act":—

Held, that a contributory pension payable to the widow and orphans of an insured man under the Widows' Orphans' and Old Age Contributory Pensions Act, 1925, does not come within the provisions of the above section and is therefore to be deducted in assessing damages for the purpose of Lord Campbell's Act.

Action at Leeds Assizes before the Lord Chief Justice without a jury.

The plaintiff sued under Lord Campbell's Act on behalf of herself and two infant children of her deceased husband to recover damages for the death of her husband from injuries caused by the defendant's negligence in driving a Post Office motor mail van at Pateley Bridge, Yorkshire, on November 13, 1925.

Her husband was a labourer aged thirty years, and at the time of his death was earning 2*l.* 10*s.* a week. He was the sole support of his wife and family, and by his death they were left destitute, except for the sum of 18*s.* a week paid to her under the Widows' Orphans' and Old Age Contributory Pensions Act, 1925. Negligence was proved against the defendant, and the only question material to this report was whether in computing damages regard should be had to this pension in view of the Fatal Accidents (Damages) Act, 1908, s. 1 (supra).

William Stewart and *H. H. Maddocks* for the plaintiff.

Mortimer K.C. and *Russell Vick* for the defendant.

Cur. adv. vult.

Judgment was delivered in London on April 13, as follows.

LORD HEWART C.J. This was an action tried before me at Leeds Assizes. The plaintiff sued the defendant under Lord Campbell's Act for damages for the death of her husband through injuries received by him in being knocked down and run over by a van belonging to the Post Office and driven by the defendant, the accident being due to negligence on the part of the defendant.

The action was brought for the benefit of the plaintiff, of her son aged three years, and of her daughter aged nine months. It was abundantly clear that the death of the plaintiff's husband was caused by the negligent driving of the defendant.

The only question which remained for argument was whether, in computing the amount of the damages payable to the plaintiff, regard ought to be had to the pension which, after the death of her husband, the plaintiff receives under the Widows' Orphans' and Old Age Contributory Pensions Act, 1925. I have come to the conclusion that that pension must be taken into consideration in the assessment of the plaintiff's compensation.

I think that that conclusion is made plain as well by the terms of Lord Campbell's Act itself as by the decision in *Baker* v. *Dalgleish Steam Shipping Co.* (1) It is quite true that by the Fatal Accidents (Damages) Act, 1908, it is provided that "in assessing damages in any action, whether commenced before or after the passing of this Act, under the Fatal Accidents Act, 1846, as amended by any subsequent enactment, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act." It was contended that the contributory scheme of pensions provided for in the Widows' Orphans' and Old Age Contributory Pensions Act, 1925, is, in substance if not in form, contractual. I have carefully considered the matter and I cannot take that view. I do not think that a widow's pension under the Act of 1925 satisfies either of the requirements of the Act of 1908. I do not think that it is accurate

(1) [1922] 1 K. B. 361.

to describe it as a "sum paid or payable on the death of the deceased," nor do I think that it can truly be said to be a sum "payable . . . . under any contract of assurance or insurance."

I am, therefore, driven to the conclusion that this contributory pension, whatever its true value may be, must be taken into account in the sense of reducing the damages which would otherwise have been payable to the plaintiff for herself and her infant children.

The result is interesting and anomalous. If a man who is insured for 20,000*l.* is killed in a railway accident his widow and children can recover from the railway company damages which are not diminished by the circumstance that on the death of the deceased there became payable the large sum assured. But when a man dies in circumstances in which his widow and children become entitled to the little pension—to which the deceased man himself has contributed—under the Widows' Orphans' and Old Age Contributory Pensions Act, 1925, the value of that pension must be deducted from any sum which the widow might otherwise recover in an action under Lord Campbell's Act. I should have decided the matter the other way if it had been possible for me to do so. But, in my opinion, as the law stands, there is no course open to me except to diminish the damages by taking that pension into account. Whether that is a desirable state of the law is a matter on which I am not called on to express any opinion.

It is exceedingly difficult to place anything like an accurate figure on the value of this pension, as it is impossible to say how long it is likely to continue. I have come to the conclusion that a fair sum for the plaintiff to recover is 1800*l.*—900*l.* for herself and 450*l.* for each of the two infant children.

Judgment for plaintiff.

Solicitors for plaintiff: *Collyer-Bristow & Co., for A. Masser, Leeds.*

Solicitor for defendant: *Solicitor to the Post Office, for Plackett & Smale, Harrogate.*

F. P. F.

Distinguished. KITCHEN'S TRUSTEE v. MADDERS. [1949] 2 All E.R. 1079.

LAWRENCE v. HAYES.

1927
March 15,16.

Practice—Assignment of Chose in Action—Claim for unliquidated Damages by Debtor against Assignor—Judgment—Set-off of Judgment by Debtor against Claim by Assignee—Merger of Debtor's Claim in Judgment.

The owner of a business sold it to the defendant on terms of payment by instalments, and then assigned the benefit of the agreement to the plaintiff. Before notice of assignment was given to the defendant, the latter obtained judgment for a sum of money against the assignor as damages for breach of warranty on the above sale. In an action by the plaintiff, as assignee, against the defendant for payment of instalments due under the assigned agreement, the defendant claimed to set off the amount of the judgment. The plaintiff contended that the defendant's right to damages in respect of the breach of warranty had merged in the judgment, and that the latter could not be set off against his claim:—

Held, that the set-off was valid.

APPEAL from Bishop's Stortford County Court.

On February 15, 1923, one Launder sold his business, that of a tobacconist, to the defendant Hayes for 750*l.*, payable 350*l.* in cash and the balance by monthly instalments with interest. On October 3, 1923, Launder by deed assigned the benefit of the above agreement of February 15 to the plaintiff. Early in 1924 the plaintiff commenced an action in the High Court against the defendant claiming 78*l.* 13*s.* 8*d.*, the amount of seven instalments with interest due under the above agreement dated February 15, the benefit of which had been assigned to him. The action was remitted to the county court. The defendant claimed to set off against the plaintiff's claim the amount of a judgment obtained against Launder in the following circumstances: After Launder had sold the business to the defendant the latter alleged breaches of the contract in that, first, certain chattels had been included which were subject to a charge which Launder had not paid off; and, secondly, that a cash register which had been included had not been paid for by Launder and was not his property, and in respect of which cash register the owners subsequently obtained judgment against Launder. The owners also instituted proceedings against the defendant for the recovery of the register, which were settled on terms. In consequence of these breaches the defendant, in January, 1924, commenced an action against Launder claiming damages for breach of warranty, and on February 26, 1924, signed judgment by default against him for 116*l.* Notice of the assignment of October 3, 1923, was then served on the defendant by the plaintiff on the day following the signing of the above judgment—namely, on February 27, 1924.

The defendant in the present action claimed to set off this sum of 116*l.* against the plaintiff's claim. The plaintiff contended that the defendant's claim for damages against Launder had been merged in the judgment obtained against him on February 26, and was not therefore available as a set-off against his claim. The county court judge gave judgment for the defendant.

The plaintiff appealed.

G. B. Hurst K.C. and *J. N. Gray* for the plaintiff. The judgment debt cannot be set off against the plaintiff's claim, and *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1), on which the county court judge decided the case, is clearly distinguishable, because in the present case the defendant's rights against Launder had become merged in the judgment obtained by him: *In re European Central Ry. Co. Ex parte Oriental Financial Corporation.* (2) It is admitted that if the defendant had not pursued his remedy and had relied on his claim for unliquidated damages as a set-off in this action his claim would have succeeded. In *Stoddart* v. *Union Trust, Ld.* (3), the proposed set-off against the claim of the assignee was a personal claim of the debtor, something "dehors the contract," as Kennedy L.J. said. (4) The defendant's set-off, as pleaded in this action, being a judgment, is dehors the contract, and therefore there is nothing to set off, although the defendant could have set off the judgment against a claim by Launder. The reason is that the rights of another have intervened—namely, those of the assignee, the plaintiff.

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(1) (1888) 13 App. Cas. 199.
(2) (1876) 4 Ch. D. 33.
(3) [1912] 1 K. B. 181.
(4) Ibid. 194.

[The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 53, sub-s. 1 (*a*), was referred to.]

Sullivan K.C. and *Laskey* for the defendant. Although unliquidated damages can be set off, they cannot be set off to any practical effect until they are ascertained, and the only way to make them ascertained is by getting a judicial decision. They must be ascertained at some stage.

J. N. Gray in reply. The defendant had an equity which he deliberately changed into something else, losing the equitable right and adopting a higher one. But the latter remedy is a much more burdensome remedy as against the plaintiff than the right in equity, and there is no reason why it should be set off against his claim.

ACTON J. This is an appeal from the Bishop's Stortford county court, by which it was held that the defendant, Mr. Hayes, was entitled to judgment against the plaintiff, Mr. Lawrence, with costs. The facts were lengthy and somewhat complicated, but the material facts ultimately resolved themselves into the following. The plaintiff sued as assignee of one Launder to recover a sum of 78*l.* 13*s.* 8*d.*, being instalments admittedly due from the defendant to Launder as instalments on the sale of a business by Launder to the defendant on February 15, 1923, of which debt the plaintiff took an assignment dated October 3, 1923. In the action which was brought by the plaintiff claiming the instalments in arrear the question arose whether the defendant was entitled to set off against the amounts which would otherwise be due and owing from him to the plaintiff an amount representing the amount of unliquidated damages to which he was entitled for breaches of warranty contained in the same contract out of which arose his indebtedness to Launder. The business which Launder sold to the defendant, which was the business of a tobacconist, was sold for 750*l.*, 350*l.* in cash, and the balance of 400*l.* to be paid by monthly instalments, with 6 per cent. interest thereon. On October 3, 1923, there was a deed executed by Launder assigning to the plaintiff all his remaining benefit under the agreement of sale with the defendant, but although that assignment was executed then, no notice thereof was given until two letters were written, the first on February 27, 1924, from the agent of the plaintiff to the defendant, and the second on May 22, 1924, from the plaintiff's solicitors to the defendant, giving notice of this assignment. The defendant's set-off arose in this way. From a period soon after the business had been assigned to him the defendant claimed against Launder that he was in breach of his agreement of sale in respect of two matters: first, that certain chattels had been sold subject to a charge which had not been paid off by Launder, and, secondly, that a cash register assigned to the defendant by the agreement was in fact not paid for and was not Launder's property, but was in his possession under an agreement pursuant to which he was liable to pay instalments, a number of which were in arrear, with the result that before the property in the cash register could be acquired by the defendant, he would be under a liability to pay still further instalments. There was then a discussion whether the register should be returned to the suppliers and an allowance made upon it or whether the defendant should acquire the property in the cash register by completing payment of the instalments, but disputes arose as to how the sum was to be fixed, and on October 17, 1923, the proprietors of the cash register obtained judgment against Launder for a sum of 45*l.* due for arrears on this cash register. In January, 1924, those proprietors issued a plaint against the defendant for the return of the register. This matter, however, was disposed of ultimately by agreement, the substance of which was that the defendant was to deliver up the register and to have it back upon certain terms. In these circumstances, an action was launched by the defendant against Launder in January, 1924, for damages for breach of warranty, in that, in addition to the above mentioned claim arising in regard to the chattels that had not been freed from the charge, Launder had no title to the cash register and accordingly there was a breach of the implied or express warranty by him as seller in the circumstances that the cash register was his to sell and that he was in a position to pass the property therein to the present defendant. On February 4, 1924, the defendant obtained an interlocutory judgment against Launder by default, and on February 26, a master in chambers assessed the damages at the sum of 116*l.* odd, and for that amount judgment was given against Launder, with costs. Up to that date, as I have already stated, no effective notice had been given of this assignment, but on the very next day, namely, February 27, the first of the notices to which our attention has been drawn in this case was given. That notice, and the subsequent notice in May, having been given to the defendant, the plaintiff then launched an action in the High Court for the sum with which we are concerned now, 78*l.* 13*s.* 8*d.*, being seven monthly instalments of 10*l.* due to the plaintiff as assignee under the agreement of February 15, 1923, and interest upon those instalments at 6 per cent. As an answer to that claim an affidavit was sworn in opposition to judgment, and in the result the matter was remitted to the county court. The substantial question which arose was whether in the circumstances which I have detailed the defendant had or had not the right to set off against or deduct from the claim of the plaintiff the amount of the liability to him by Launder for damages for breach of warranty contained in the same agreement out of which the indebtedness of the defendant to the plaintiff arose. The point which was relied upon in argument in this Court was that the defendant could not rely upon any such set-off, because the defendant having recovered an interlocutory judgment and subsequently a final judgment against Launder, there was a merger of the original liability in damages of Launder in the judgment which the defendant had obtained against him. It was admitted that if the defendant had not in fact pursued his remedy against Launder but had for the first time formulated his claim to unliquidated damages in the present action, he would have been entitled to do so, and, subject to his proof of the appropriate facts, there could have been no answer in law to the claim which he sought to set up as a set-off against or a deduction from the claim raised by the plaintiff. It is not surprising that that admission should be made, because apart from any cases which have been referred to before us in the course of the argument, *Young* v. *Kitchin* (1) quite clearly establishes that that is an incontrovertible proposition of law. The headnote to that case is as follows: "The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counterclaim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—Held, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of the defence must be amended accordingly." That case was referred to, and referred to with approval, in *Government of Newfoundland* v. *Newfoundland Ry. Co.* in the Privy Council (2), to which reference was made in the argument yesterday. There remains therefore upon the argument as addressed to us the sole question, whether that which would indisputably have been the right of the defendant in the present action is barred by the mere fact that before he had any notice of this assignment he had obtained a judgment crystallizing the liability of Launder to him in respect of these damages. If that were the result it would appear, at all events, to be a somewhat startling one. To my mind the argument that a merger can operate in these circumstances as against the defendant for the benefit of the plaintiff is based upon an entirely erroneous hypothesis. As was said by Maule J. in *Price* v. *Moulton* (3): "[In merger] the policy of the law is, that there shall not be two subsisting

(1) (1878) 3 Ex. D. 127. (2) 13 App. Cas. 199.
(3) (1851) 10 C. B. 561, 574.

remedies, one upon the covenant, and another upon the simple contract, by the same person against the same person for the same demand." The words to be emphasized or italicized are the concluding words, and if for the word "covenant" in that sentence the word "judgment" be substituted, and for the words "[remedy] upon the simple contract" be substituted the words "liability in unliquidated damages," the sentence is made to fit the facts in this particular case, and the policy of the law is as Maule J. enunciated it. In the present case it is apparent that in the first place the persons concerned are not the same as the persons concerned in the judgment; the plaintiff had nothing whatever to do with the judgment. In the second place the remedy is not of the same kind. As against Launder one might say that it was a weapon of offence; as against the plaintiff it could only be made, as *Young* v. *Kitchin* (1) shows, a weapon of defence, and the only relevant inquiry with regard to the amount of unliquidated damages in which Launder is liable to the defendant is whether it is equivalent to the amount of the plaintiff's claim, and no further; for if upon investigation it is proved that the amount recoverable in damages overtops the amount of the plaintiff's claim, the surplus is of no matter whatever. It is perhaps always likely to make matters clear if one puts questions of this kind as a pleader would put them. I suppose he would put them in some such way as this. The statement of claim would be, that the plaintiff claims as assignee of one Launder instalments of a debt accrued due and payable by the defendant to Launder, which debt was by Launder assigned by an absolute assignment in writing to the plaintiff, of which assignment notice was duly given by the plaintiff to the defendant. The defence would be that, subject to set-off and counterclaim, the defendant admits the debt, but he says that he has a claim against Launder for unliquidated damages arising out of the same contract as that under which his indebtedness to Launder arises, and claims the right to set off against or deduct from the amount of the plaintiff's claim an amount of those damages equivalent to the whole or a part of the plaintiff's claim, and, of course, proper particulars would be given. To that counterclaim the pleader acting for the plaintiff has to find a defence, and, according to the argument we have heard, the defence would be to the following effect, that by way of defence to the set-off and counterclaim, the defendant had, before notice of the assignment of the debt due from him to Launder was given, obtained a judgment against Launder for the recovery of the unliquidated damages, the whole or a part of which he now seeks to set off against or deduct from the amount of the plaintiff's claim, and that the effect of that judgment was that there was a merger in the judgment debt of Launder's liability to damages. On that the question arises which is really the question in this case, whether that would not be a demurrable defence to a counterclaim, in other words, whether it would be bad in law and one which could not in any view of it be sustained.

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(1) 3 Ex. D. 127.

In my opinion it is not an available defence in these circumstances. It is not disputed that there was a merger as between Launder and the defendant or that there was a consequent estoppel as between them which arose from the judgment. Although it is entirely unnecessary to decide it, it seems to me, as Serjeant Sullivan for the defendant has contended, that it may well be that it would be open to the plaintiff in these circumstances to say something to this effect: It is all very well for you to say that you have got judgment against Launder, but if you are seeking for a different kind of purpose to exercise a different kind of remedy against a different person, that different person may call upon you to prove the necessary facts to show that in fact you have a claim to unliquidated damages to an amount equivalent to or over-topping his claim against you. If that question had arisen in any form, it would no doubt have been dealt with on the counterclaim, and it might have been that we should have had to consider it and express some view upon it; but no such course was taken. We have been told, and it is not controverted, that the case proceeded upon the basis that in substance the amount for which the defendant recovered judgment against Launder substantially represents the amount of damages which the defendant had in fact suffered by reason of the breaches of warranty.

In the county court the plaintiff went so far as to address to the learned judge an argument that although a judgment had been obtained by the defendant against Launder, and was, of course, binding between those parties, nevertheless it was open to the plaintiff to say that the damages in respect of which that judgment had been obtained were in fact unliquidated, and that as far as they were unliquidated damages they could not in law be set off against the plaintiff's claim. Mr. Gray, for the plaintiff, to whose ability we are indebted in this case, agreed that that argument was untenable, but the material fact for the purposes of our decision is that the argument was delivered, and, therefore, that the case proceeded to decision upon the basis that nobody sought to dispute the substantial correctness of the figure representing the indebtedness of Launder to the defendant, and that it was the plaintiff who sought to go behind the judgment, if I may so express it, and to argue that looking behind that judgment to the nature of the claim upon which it was founded, that claim was one which could not be set up against him. In these circumstances it seems to me to be unnecessary to consider the matter any further. The dilemma which the plaintiff is in in these circumstances is this: that if he desired to question in substance the amount of the damages recoverable by the defendant against Launder, he should have taken steps to raise the question whether that was not a matter that ought to be considered or dealt with in some way or another. He did no such thing, and, on the other hand, he allowed the case to proceed upon the basis that so far as the amount was concerned he did not seek really to raise any question at all. On the other hand, if it be said that the defendant sought to rely upon the judgment as a judgment binding against the plaintiff, one can only say that the evidence seems to be all the other way, and it seems reasonably clear that the case was never put upon that basis, but upon the basis which I have indicated.

In the result, therefore, I arrive at the conclusion that so far as the question of merger is concerned, it cannot be relied upon by the plaintiff as a defence to the set-off and counterclaim which was raised against him in the present action. I think therefore the appeal ought to be dismissed.

TALBOT J. I am of the same opinion. The plaintiff is the assignee of a man named Launder of a contract which Launder made with the defendant for the sale to him of a tobacconist's business, and the learned county court judge has allowed as against the plaintiff's claim as assignee, that claim being for sums due under the contract of sale from the defendant to Launder, a set-off of a sum which is in fact the amount of a judgment recovered by the defendant against Launder in an action which he brought in the High Court for damages for breach of warranty of title as to part of the stock and furniture which Launder purported to sell. In that action the defendant established that part of the stock and furniture were not Launder's at all. The judgment obtained by the defendant against Launder was obtained after the assignment to the plaintiff, but before notice of it to the defendant. It is admitted that this claim of the defendant for damages could in equity have been set off as against the assignee's claim. That admission could not be avoided in view of the cases of *Young* v. *Kitchin* (1) and of *Government of Newfoundland* v. *Newfoundland Ry. Co.* (2) The matter is now regulated by s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66), which contains the words in qualification of the rights of the assignee of a debt "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed," and that, as was explained by Cleasby B. during the argument in *Young* v. *Kitchin* (3), means, as indeed is obvious, "subject to all equities which would be enforced" (which would have

(1) 3 Ex. D. 127.

(2) 13 App. Cas. 199.

(3) 3 Ex. D. 130.

been enforced would be more verbally correct) "in a court of equity."

The whole case as argued before us, that admission being made, is this. It is said that having had this claim which would be matter of set-off in equity and under the Judicature Act, 1873, the defendant has lost that right of set-off because he has obtained a judgment giving binding effect as between him and Launder to that claim, and that that judgment which is in itself not matter of set-off under the principles of equity and under the Judicature Act, has extinguished or superseded or merged the claim which was a matter of set-off before it was obtained. It was argued that that which appeared to be a very unattractive technicality had a foundation in substance, because whereas the amount to be set off in respect of an unliquidated claim would have to be ascertained by some inquiry in the action between the assignee and the defendant (as is apparently recognized at the end of the judgment in the *Newfoundland* case (1)), and in such an inquiry the assignee would have the right to appear and take part; on the other hand, the judgment was obtained without his knowledge and in his absence. That was the argument, and on the strength of it, as well as of the technical argument which was adduced to support it, we are invited to lay it down as law that if a claim against an assignor which would be proper matter of set-off against the assignee has, after the assignment but before notice of it, been translated into a judgment, the right of set-off has gone. No authority for such a proposition has been brought to our notice, and it appears to me to be quite contrary to the principles upon which, before the Judicature Act, 1873, courts of equity dealt with this matter. They are clearly stated in a passage which has been frequently quoted as declaring the law on this matter. James L.J. in *Roxburghe* v. *Cox* (2) says: "An assignee of a chose in action . . . . takes subject to all rights of set-off and other defences which were available against the assignor, subject only to this exception, that after notice of an assignment of a chose in action the debtor cannot by payment or otherwise do anything to take away or diminish the rights of the assignee as they stood at the time of the notice. That is the sole exception." Here this judgment was obtained before notice of the assignment. Moreover, it is, I entirely agree, plain that the merger of the defendant's cause of action against the assignor in the judgment operates only as between the parties to that cause of action; it cannot deprive the defendant as against the assignee of any right of set-off which could have been founded on the cause of action itself.

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(1) 13 App. Cas. 199.

(2) (1881) 17 Ch. D. 520, 526.

With regard to the other argument of the plaintiff I desire to reserve my opinion as to exactly how far it was open to him to challenge the accuracy in point of amount of the judgment. It is quite clear that as a matter of estoppel the assignee is not estopped by the judgment obtained by the defendant against the assignor; but I do not feel sure that equity would not allow the set-off of such a judgment debt as this, due from the assignor before notice of the assignment, as a judgment debt; and it may be that such a judgment could only be challenged by the assignee on the ground of collusion or fraud. It is unnecessary to decide that question in the present case, because here either the plaintiff made no attempt to challenge the accuracy of the judgment, or, if he did, the county court judge decided against him on that point, and if he did so decide, that would be a decision of fact as to which there is no appeal to this Court.

In my opinion, on the facts as found by the learned county court judge, the allowance of the set-off was perfectly right in law, and I agree, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Field, Roscoe & Co., for William Gee & Sons, Bishop's Stortford.*

Solicitors for defendant: *Beardall & Co.*

W. L. L. B.

O'CEDAR, LIMITED *v.* SLOUGH TRADING COMPANY, LIMITED.

1927
March 16, 17, 28.

[1926. O. 76.]

Landlord and Tenant—Lease—Implied Covenant—Derogation from Grant—Interference with User of demised Premises—Use of adjoining Premises so as to render increased Fire Insurance Premium payable.

Lessees of factory premises for a term of twenty-one years covenanted to pay as additional rent such sums as the lessors might expend in effecting or maintaining the insurance of the demised premises against fire and not to do or suffer anything on the demised premises which would render payable an increased or extra premium for the insurance of the demised premises or other premises adjacent thereto. The lessors covenanted to keep the demised premises insured against fire and that the lessees should have quiet enjoyment of them. Subsequently, the lessors let premises adjacent to the demised premises to another lessee whose trade as a woodworker rendered it impossible for the insurance of the demised premises to be effected except at considerably increased premiums:—

Held, that the lessors, by dealing with the adjoining premises in a way which was not unreasonable or unbusinesslike, which did not affect the originally demised premises physically and which had rendered it, not less easy or legal, but substantially more expensive to conduct on them the business for which they had been demised, had not so interfered with the purpose for which those premises had been demised as to have derogated from their own grant of them.

Held, further, that the covenant by the lessees not to do or suffer anything on the originally demised premises which would render payable an increased or extra premium for the insurance of those, or adjacent, premises did not impliedly put the lessors under a similar obligation with regard to their user of adjacent premises.

ACTION tried by Branson J. without a jury.

The following statement of facts is taken substantially from the judgment:—

The defendants were the owners of certain property near Slough known as the Slough Trading Estate, and their business was to let buildings on the estate to persons who were prepared to rent them for factories and the like. The plaintiffs were manufacturers of mops and polishes.

By an indenture dated May 31, 1922, the defendants demised to the plaintiffs a part of building No. 8 on the Slough Trading Estate for a term of twenty-one years, the plaintiffs agreeing to pay "therefor yearly during the said term hereby granted and so in proportion for any less time

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than a year the rent of 3700*l*. . . . . and also paying as additional rent from time to time a sum or sums of money equal to the amount which the lessors may expend in effecting or maintaining the insurance of the said premises against loss or damage by fire. . . . ."

Clause 8 of the indenture provided: "The lessees will not carry on or permit upon the said demised premises any noxious or offensive trade or business or do or suffer any other thing which may render an increased or extra premium payable for the insurance of the said demised premises or other premises adjacent thereto against fire or which may make void or voidable any policy for such insurance but this prohibition shall not be deemed to prevent the use of the said demised premises for the manufacture of the mops and polishes sold by the lessees or any similar articles of a like nature. . . . ."

By clause 19 the defendants covenanted "that they will adequately insure and keep insured the said demised premises against fire and in case of destruction or damage by fire will forthwith rebuild or reinstate the same and that the lessees paying the several rents hereby reserved and performing and observing the several covenants conditions and agreements herein contained and on their part to be performed and observed shall and may peaceably and quietly hold and enjoy the premises hereby demised during the term hereby granted without any lawful interruption or disturbance from or by the lessors or any person or persons claiming under or in trust for them."

By a further indenture dated June 22, 1922, the defendants demised to the plaintiffs the rest of building No. 8 on the same terms.

Until January, 1923, the defendants, who had a general insurance policy covering all their buildings at a flat rate of 2*s*. 6*d*. per cent., allowed the plaintiffs the benefit of that rate. When they decided to discontinue that method of dealing with the matter they agreed to the plaintiffs, as their agents, effecting an insurance of the building and the plaintiffs' plant at a rate of 2*s*. 6*d*. per cent. When the plaintiffs began to use the machinery in the building for making their packing cases this rate was raised to 3*s*. on the building and 3*s*. 6*d*. on the contents.

By a deed of surrender dated May 7, 1924, the plaintiffs surrendered to the defendants a portion—about one-third—of building No. 8. The deed contained a covenant by the plaintiffs to build a party wall to separate the surrendered portion from that retained by them, and a wall was built accordingly.

By an indenture dated March 24, 1925, the defendants let the surrendered portion of building No. 8 to one Davies, a woodworker and maker of aeronautical parts and motor bodies. The terms of this lease were in all material respects the same as those of the lease to the plaintiffs. On September 1, 1925, it having come to the knowledge of the plaintiffs' insurers that a portion of the building occupied by them had been let as a woodworking factory, they raised the rate for insurance to one guinea per cent. for the remainder of the currency of the policy and refused to renew it. After considerable trouble the plaintiffs succeeded in effecting other insurances at a rate averaging 18*s*. 9*d*. per cent. Branson J. found as a fact that this rise in the premiums demanded of the plaintiffs was due to the letting of the surrendered portion of building No. 8 as a woodworking factory, and that if that portion of the building had not been let for such a purpose the plaintiffs would have been able to continue to insure their premises at rates of 3*s*. and 3*s*. 6*d*. per cent.

The plaintiffs claimed a declaration that the defendants were not entitled to let the part of No. 8 building which had been surrendered by them, or any part thereof, to such tenant or tenants, or for such purposes, as would cause the rate of premiums for the insurance of the premises leased to the plaintiffs, or of any stock or plant thereon, to be raised. They also claimed an injunction and damages.

Grant K.C. and the *Hon. H. Fletcher Moulton* for the plaintiffs.

Archer K.C. and *St. John Field* for the defendants.

Cur. adv. vult.

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March 28. BRANSON J. read a judgment in which he stated the facts and continued: The present action is brought by the plaintiffs to recover the difference between the 3*s.* and the 3*s.* 6*d.* per cent. insurance premiums, which they used to pay, and the 18*s.* 9*d.* which they now have to pay and will have to pay in the future so long as Davies uses the premises demised to him for the purposes for which they were demised.

Mr. Grant puts his case in two ways. First, he says that when the defendants put the plaintiffs under an obligation to do nothing which might render an increased or extra premium payable for fire insurance on the demised building, or buildings adjacent thereto (clause 8 of the lease of May 31, 1922), they impliedly came under a correlative obligation not to do anything on their part which would render an increased premium payable for fire insurance upon the demised premises. For this proposition he relies upon *Barnes* v. *City of London Real Property Co.* (1) In my opinion, that case has nothing to do with the present one. There the decision was that the reservation of a rent for the purpose of providing a housekeeper implied a correlative obligation on the part of the landlords to give an equivalent for that for which the rent was reserved. It was said by way of illustration that, if there was a reservation of rent in favour of a lessor for the purpose of effecting insurance against fire on the property, there must be an obligation on his part to employ the money paid him for insurance in effecting the insurance. Apart from the fact that in this case the correlative obligation to effect the insurance is express (see clause 19 of the lease), that is a very different thing from saying, as I am asked to say here, that, when a lessor puts his lessee under an obligation not to use the demised premises in a particular way, he thereby becomes bound to his lessee not to use the remainder of his land in the way in question. I know of no authority for such a proposition, nor does it seem to me that it can possibly be sound.

Secondly, it is said that the defendants' action, resulting as it has in making it necessary for the plaintiffs to pay vastly increased premiums for the insurance of the premises, is a breach of the covenant to be implied into the lease that the lessors will not derogate from their own grant. This renders it necessary for me to consider the extent and application of the principle on which Mr. Grant relies. The principle has been stated on various occasions. It is clear that when premises are let for a particular purpose the lessor must not do anything which would frustrate the purpose for which they are let: see per Lord Loreburn in *Lyttelton Times Co., Ld.* v. *Warners, Ld.* (1); and this is the case, although that which is done by the lessor and results in the frustration may have no physical effect upon the demised premises: *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ld.* (2) If there had been evidence to show that the action of the defendants had rendered it impossible in a commercial sense to insure these buildings at all, which as a matter of fact could only be the case if the adjoining premises had been let for some wholly unusual and unexpected purpose, different considerations might well apply. In the case before me, however, the purpose for which the premises were demised to the plaintiffs has not been frustrated by what has been done by the defendants. The plaintiffs can still conduct their business as they were able to before the surrendered premises were let to Davies. The premium which they have to pay is still much less than ordinary commercial businesses of some kinds have to pay. For instance, woodworking factories working for the trade often pay as much as 50*s*. per cent. and most woodworkers not less than 21*s*. But the advent of Davies has resulted in its costing the plaintiffs 600*l*. or 700*l*. a year more than it used to do to fulfil their covenant to pay for the insurance of the premises. It, therefore, becomes material to consider whether the principle that a lessor may not derogate from his grant extends beyond cases in which the purpose of the grant is frustrated to cases in which that purpose can still be achieved albeit at a greater expense or with less convenience.

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(1) [1918] 2 Ch. 18.

(1) [1907] A. C. 476, 481.

(2) [1921] 1 Ch. 200.

That it does not extend to prevent any interference at all with the enjoyment of the property demised is beyond doubt. This appears from *Robinson* v. *Kilvert* (1) and *Browne* v. *Flower*. (2) There must be a substantial interference with the use of the premises for the purposes for which they were demised. I was invited by Mr. Archer to hold that mere interference, although it may be substantial, is not enough, but that the principle applies only in cases in which what has been done frustrates the purpose for which the premises were demised to the lessee. This appears to me to be contrary to the decision of Stirling J. in *Aldin* v. *Latimer Clark, Muirhead & Co.* (3), where a substantial interference with the purpose for which the premises had been demised was held to entitle the lessee to damages, although it was not suggested that that purpose had been frustrated. *Aldin* v. *Latimer Clark, Muirhead & Co.* (3) and *Browne* v. *Flower* (2), were treated by the Court of Appeal in *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ld.* (4), as stating the principle correctly. I see no reason in logic or fairness for limiting the application of the principle to cases in which there has been a complete frustration of the purpose for which the premises were demised.

The fact remains, however, that, as was said by Younger L.J. in *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ld.* (4), the obligation laid upon the grantor is not unqualified. It must in every case be construed fairly, even strictly, if not narrowly. It must be such as in view of the circumstances was within the reasonable contemplation of the parties at the time when the transaction was entered into.

It is convenient at this stage to deal with Mr. Archer's contention that the principle that a grantor must not derogate from his own grant has no application at all to the present case by reason of the fact that the premises let to Davies were originally granted to the plaintiffs and were by them surrendered to the defendants, so that qua those premises the plaintiffs and not the defendants are the grantors. In the view which I take of the case it is not material for me to decide this point. I content myself with saying that it might well constitute a difficulty in the way of the plaintiffs, because, if the defendants' contract not to derogate from their grant is to be implied upon the original lease, it could not apply to these premises which were included in the original lease, and the surrender contains no new grant by the defendants to the plaintiffs of the premises not surrendered.

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(1) (1889) 41 Ch. D. 88.
(2) [1911] 1 Ch. 219.
(3) [1894] 2 Ch. 437.
(4) [1921] 1 Ch. 200.

But I proceed, for the purposes of my judgment, on the assumption that there is nothing in this point and that the position created by the original lease and the surrender is as it would have been had the original lease contained only those premises now held by the plaintiff and had the premises now let to Davies been then left in the hands of the defendants. In my judgment, even so, the principle invoked by the plaintiffs does not assist them in this case. The contention is that the defendants, by doing something on the adjoining land which is not in itself unreasonable or unbusinesslike, which has not affected the demised premises physically in any way, which has not rendered it less easy or less legal to carry on upon them the business for which they were demised, but which has had the effect of adding substantially to the expense of carrying on that business there, have derogated from their grant. I should be extending the application of the principle into a region quite different from that in which it has hitherto been applied if I were to hold that it applied to anything done by a lessor upon adjoining land which, while not otherwise affecting the demised premises or their user in any way, merely made it more expensive than it was before for the lessee to carry on his business on the demised premises. I do not think such a case comes within that principle at all. It might as well be said that if the defendants had started paying higher wages in the adjoining factories on their land and thereby raised the price of labour in the neighbourhood the plaintiffs would have had an action for damages upon this principle. And many other instances might be cited, for it is difficult to place any limit upon the application of the principle if it extends to such a case as the present. Mr. Grant relies upon the inclusion in the lease of the covenant by the plaintiffs not to do anything on the demised premises which might make it more expensive to insure the adjoining premises as indicating that a similar covenant on the part of the defendants should be implied as having been within the contemplation of the parties. To my mind it leads rather to the opposite conclusion. The fact that something done on one set of premises might affect the rate of insurance payable upon adjoining ones was obviously present in the minds of both the parties, and a covenant by one party in relation thereto was inserted and none by the other. I cannot think that it was within the reasonable contemplation of the parties that the defendants were putting themselves under such an obligation to the plaintiffs as that contended for in this case.

The action fails, and must be dismissed with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Richardson Sowerby, Holden & Co.*
Solicitors for defendants: *Kenneth Brown, Baker, Baker.*

G. F. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1926
Dec. 15, 16

MORGAN *v.* LIVERPOOL CORPORATION.

[2354 of 1926.]

Landlord and Tenant—Industrial Dwelling-house—"In all respects reasonably fit for human habitation"—"Good and tenantable repair"—Statutory Condition of Tenancy—Defective Sash-cord—Injury to Tenant—Liability of Landlord—No Notice of Disrepair—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2*—Housing Act,* 1925 (15 *Geo.* 5, *c.* 14), *s.* 1.

The tenant of an industrial dwelling-house, which as regards rent came within the provisions of the Housing Act, 1925, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the rent of which had been increased under the latter Act, sought to recover from his landlords, the defendant corporation, his medical expenses and damages for loss of work incurred by reason of an accident suffered by him when, in opening one of the windows of the house, as soon as he had unlatched the top sash it fell owing to the breaking of the sash cord and severely crushed his hands. He based his claim on the alleged failure of the landlords to perform their statutory obligations under the Housing Act, 1925, to keep the house "in all respects reasonably fit for human habitation" and, alternatively, under the Increase of Rent, etc. (Restrictions) Act, 1920, to keep the house in "good and tenantable repair." The presiding judge of the Liverpool Court of Passage gave judgment for the plaintiff on the ground of the failure of the landlords to keep the house "in all respects reasonably fit for human habitation":—

Held, by the Court (Lord Hanworth M.R., Atkin and Lawrence L.JJ.) that, whatever was the effect of the provisions of the above mentioned Acts upon a landlord's responsibility for the condition or state of repair of houses coming within the scope of those Acts (upon which, as applied to the facts of this case, the Court was not unanimous), it was a condition precedent to the liability of the landlord that notice of latent as well as of patent defects should be given to him by the tenant, whether or not the landlord had a right of access to inspect the state of repair of the house; and that the absence of such notice in the present case was fatal to the plaintiff's claim.

Observations of the Court upon the meaning of the words "in all respects reasonably fit for human habitation" in s. 1 of the Housing Act, 1925.

APPEAL from a decision of the presiding judge of the Liverpool Court of Passage.

The plaintiff Morgan was the tenant of No. 63 Holly Street in the city of Liverpool, a house owned by the respondent corporation, and containing a kitchen, a back kitchen, and two rooms upstairs. The standard rent was 5*s*. 6*d*. a week, but the rent had been increased to 8*s*. 1*d*. a week.

The plaintiff's claim arose out of an accident which happened to him when in opening the upper portion of the window in the back upstairs room one of the cords of the window sash broke, with the result that the top part of the window slipped down and caught the plaintiff's hand and injured it. A piece of glass from one of the panes in the upper part of the window, which broke in the course of its fall, struck one of the plaintiff's eyes. The effect of the accident was that he had to receive treatment to both his hand and eye at the hospital, and he claimed to recover 10*s*. for his hospital expenses and 20*l*. on the ground that he had lost his earnings as a contractor for a period of four weeks. He based his claim upon the contractual liability of the defendants (*a*) for quiet enjoyment; (*b*) for repairing and keeping in repair the premises; and (*c*) for keeping the premises in all respects reasonably fit for human habitation; the last two heads of claim resting on the covenants imported, as the plaintiff alleged, into the tenancy of a house of this class by the Housing Act, 1925, and the Increase of Rent, etc. (Restrictions) Act, 1920.

A notice was posted up in the house containing certain conditions, including a reservation by the defendants of the right of entering the house at any time without previous notice to view the state of repair, and also a prohibition against the driving of nails into any part of the woodwork of the house.

The presiding judge came to the conclusion that the premises were not in all respects reasonably fit for human habitation and he gave judgment for the plaintiff for 24*l*.

The defendant corporation appealed. The appeal was heard on December 15 and 16, 1926.

Singleton K.C. and *Clothier* for the appellants. This house comes within s. 1 of the Housing Act, 1925, and the first question is whether the broken window cord caused the

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house not to be reasonably fit for human habitation. A further question is whether notice to the landlord is necessary in order to render him liable. The judge below, relying on *Walker* v. *Hobbs & Co.* (1), held that it was not necessary. We submit that it was; and that as no notice was given the plaintiff has not performed that condition precedent to his right to recover damages.

The object of the Housing Act was not to put working men in any better position than every one else. If a broken window cord renders a house not reasonably fit for human habitation, innumerable houses in the Kingdom would be uninhabitable. Even if both cords had gone so that the window had to be nailed up, we submit that would not have made it unfit for human habitation. The standard of repair under the Housing Act is not so high as the standard in a covenant to keep in good and tenantable repair: *Jones* v. *Geen.* (2) In *Smith* v. *Marrable* (3), Parke B. discussed the meaning of "habitable." A landlord was held not to commit a breach of a condition that a house is reasonably fit for human habitation within s. 14 of the Housing, Town Planning, etc., Act, 1909, because the house was from time to time infested with rats: *Stanton* v. *Southwick.* (4) *Walker* v. *Hobbs & Co.* (1) has no real application to the present case, because the Act of 1925 contains the further words "and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation." We adopt as part of our argument the discussion upon the words "reasonably fit for human habitation" contained in Foà on Landlord and Tenant, 6th ed., p. 173.

There is the further question whether notice by the tenant is a condition precedent before he can recover under the Housing Act, 1925. In *Fisher* v. *Walters* (5) the Divisional Court held that absence of notice did not preclude the tenant from recovering under s. 14 of the Housing, Town Planning, etc., Act, 1909, for injury caused by the fall of a defective ceiling, because the Court was of opinion that it was a latent defect. *Tredway* v. *Machin* (1) was not referred to in that case, nor were the observations of Lord Sumner in *Murphy* v. *Hurly* (2) rightly understood, and we submit that the decision in *Fisher* v. *Walters* (3) went too far. The question of notice arises at common law and not under the Act, and before the landlord can be made liable under an obligation to repair, it is the duty of the tenant to give notice: *Hugall* v. *M'Lean* (4); *Tredway* v. *Machin* (1); *Murphy* v. *Hurly* (2); *Griffin* v. *Pillet.* (5)

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(1) (1889) 23 Q. B. D. 458.
(2) [1925] 1 K. B. 659.
(3) (1843) 11 M. & W. 5, 8.
(4) [1920] 2 K. B. 642.
(5) [1926] 2 K. B. 315.

Batt for the respondent. Whether this house was "reasonably fit for human habitation" is a question of fact, and unless there was no evidence on which the judge could have found that the house was not reasonably fit, this Court will adopt his finding. It is a question for the jury: *Walker* v. *Hobbs & Co.* (6) A window which may collapse at any moment, just like a defective ceiling, renders a house unfit for human habitation. It becomes a menace, and the house is not "in all respects" reasonably fit. I submit that the test is this—that if the house is in such a state that by ordinary user damage may be caused to the tenant, then the house is not in all respects fit for human habitation.

This is a statutory obligation on the landlord different from an ordinary covenant, and there are no words in the Act requiring notice to be given.

[LORD HANWORTH M.R. But his obligation is to be equivalent to an implied covenant, to which *Makin* v. *Watkinson* (7) would apply.]

In that case the disrepair was a matter wholly within the cognizance of the lessee. Here, the landlord has under s. 1, sub-s. 2, the right to enter and inspect the state and condition of the premises. The doctrine importing notice into the covenant depends upon the actual facts existing in each

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(1) (1904) 91 L. T. 310.
(2) [1922] 1 A. C. 369.
(3) [1926] 2 K. B. 315.
(4) (1885) 53 L. T. 94.
(5) [1926] 1 K. B. 17.
(6) (1889) 23 Q. B. D. 458.
(7) (1870) L. R. 6 Ex. 25.

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case, per Lord Buckmaster in *Murphy* v. *Hurly* (1), and rests upon the fact that the tenant knows of the defect, and it would be unreasonable not to give notice to the landlord. This was admittedly a latent defect. Notice is not necessary where the tenant does not know, and has had no opportunity of knowing, of the defect: *Murphy* v. *Hurly*. (2) Under the conditions posted up in the house the landlords reserved the right of entering the house at any time without notice. The Housing Act is for those who do not know their full rights, and the Act advisedly omitted any provision requiring notice, but the landlord was given the right of entering at any time. *Hugall* v. *M'Lean* (3) and similar cases were between landlords and well-to-do tenants, but that is not the case here.

Further, the rent in this case had been increased under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 1 (*d*), and sub-s. 5 defines the expression "repairs" as meaning repairs necessary for the state of "good and tenantable repair," and the landlord is made responsible for repairs in respect of which the tenant is under no express liability. That imposes a statutory obligation on the landlord to keep the premises in good and tenantable repair, and if he does not do so his right to recover the increased rent is suspended by s. 5 of the later Act of 1923. An obligation to keep in good and tenantable repair, is a higher and more onerous obligation than to keep a house in all respects fit for human habitation, so that quite apart from the Housing Act, the appellants are liable for failing to keep this house in good and tenantable repair.

Singleton K.C. in reply. Even if the landlord has power to enter and inspect the premises, means of knowledge are not the same as knowledge. The obligation under the statute is limited to the landlord and the tenant, it does not place the landlord under any duty or liability to third parties: *Ryall* v. *Kidwell & Son*. (4)

It has never been decided that the Increase of Rent, etc.,

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(1) [1922] 1 A. C. 369, 375.
(2) [1922] 1 A. C. 369.
(3) 53 L. T. 94.
(4) [1914] 3 K. B. 135.

Acts have imposed a liability upon the landlord to do repairs. Sect. 2, sub-ss. 1 and 5, amount to this—that unless a landlord is responsible to some extent for repairs he cannot get an increase of rent. If, however, those Acts do impose an obligation on the landlord to do repairs, then I submit that a defective window cord is not a breach of a covenant to keep in good and tenantable repair.

LORD HANWORTH M.R. stated the facts and continued: The plaintiff's claim has been based upon the liability of the defendants which was attached to the premises for breach of their covenants: (1.) for quiet enjoyment, (2.) that the defendants would repair the premises and keep them in repair, and (3.) that the premises were, at the commencement of the tenancy, in all respects reasonably fit for human habitation and should, during the holding, be kept reasonably fit for human habitation. The second and third points arose upon the covenant which is imported into a tenancy of a house of this class by the Housing Act, 1925, and by the effect of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. To both of those statutes I must refer at greater length in a moment. The learned judge of the Court of Passage came to the conclusion that the premises were not in all respects reasonably fit for human habitation, and he allowed judgment to pass for the plaintiff for 24*l.*

It was contended on behalf of the defendants, first, that the facts proved did not bring the case within a breach of the covenant which is implied under the Act of 1925, and, secondly, that there was no notice given, whereas notice ought to be given where it is contended that a landlord failed to comply with his covenant to repair. Then there was a third ground which has been argued in this Court and which the learned judge had presented to him but apparently not fully argued before him—namely, that there was a liability imposed upon the landlord by virtue of the Increase of Rent, etc. (Restrictions) Act, 1920. That has been argued before us and we must deal with it. By the statute applicable to the Court of Passage there is the same appeal to this Court as from a decision of a judge sitting in the High Court. We are, therefore, reviewing the decision of the presiding judge, and matters both of evidence and law are open and must be considered in this Court.

I desire now to direct attention to the covenant on which the claim is based. This house is what I might call one of the industrial dwellings in which working men have their homes, and by s. 1, sub-s. 1, of the Housing Act, 1925, it is provided that "In any contract for letting for habitation a dwelling-house at a rent not exceeding" certain sums therein mentioned, a condition with which this house complied, "there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation." By sub-s. 2: "The landlord, or any person authorised by him in writing, may at reasonable times of the day, on giving twenty-four hours' notice in writing to the tenant or occupier, enter any premises to which this section applies for the purpose of viewing the state and condition thereof." It is said that there was evidence upon which the presiding judge ought to hold that by reason of the breaking of this window cord the house was not in all respects reasonably fit for habitation.

Alternatively, the liability upon the defendants was suggested to arise from the terms of the Increase of Rent, etc. (Restrictions) Act, 1920, which, by s. 2, sub-s. 1 (*d*), says: "In further addition to any such amounts as aforesaid—(i.) where the landlord is responsible for the whole of the repairs" there may be a certain addition to the rent, and "(ii.) where the landlord is responsible for part and not the whole of the repairs" a lesser amount may be added to the rent. Sub-s. 5 provides that "For the purposes of this section, the expression 'repairs' means any repairs required for the purpose of keeping premises in good and tenantable repair, and any premises in such a state shall be deemed to be in a reasonable state of repair, and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability." It is said that inasmuch as the rent has been increased in pursuance of the Increase of Rent, etc. (Restrictions) Acts the tenant is entitled to impute to the landlord a condition of liability for repair which is indicated in the sections which I have read, and which is a condition precedent to the landlord being entitled to recover a larger sum of rent.

After giving the best consideration that I can to these points, I think it right to express my opinion. The point of notice, to which I will come, and which applies to both points, is also essential to the case, but I think it would be unfortunate not to express an opinion after the argument that we have had, because one might leave the case in a condition in which it might be supposed that, if notice had been given, the tenant would have been entitled to recover.

Taking first the expression in the Housing Act, 1925, I ask myself whether, if a window cord is in such a condition that it in fact breaks, that is evidence that the house is not in all respects reasonably fit for human habitation. The learned judge below attached some importance, and rightly, to the words "in all respects." It appears to me that one must also bear in mind that the words are "reasonably fit." In some measure the terms "in all respects" and "reasonably" may seem antagonistic, but one has to ask oneself whether such a misfortune as happened on this occasion is evidence cogent enough to establish as against the defendants that the house was not in all respects reasonably fit for human habitation. I should be sorry in any way to cut down the responsibility which is thrown upon landlords by this term in favour of those who occupy houses of this class. It is important, however, that one should deal reasonably with the interpretation, and not overlook that word which is found in this portion of the sub-section. It appears to me that the breaking of a window cord is an accident which may take place in any sort of house. Although in order to make a house in all respects fit for habitation I should think it is clear that it must have

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windows, and windows that open, it appears to me that the breaking of a window cord is an incident in the course of the habitation of a house which must from time to time occur in all classes and kinds of houses inhabited by all classes and kinds of persons, and in itself I cannot see that that incident afforded a proof or a test that one could apply in determining whether or not the house was fit or unfit for human habitation.

Turning now to the other claim which is made under the Increase of Rent, etc. (Restrictions) Act, 1920, I have grave difficulty in seeing that the plaintiff is entitled to rely upon that Act as giving him the foundation for a cause of action. The Increase of Rent, etc. (Restrictions) Acts were intended to restrict the power of landlords unduly to increase the rent of houses to which the Acts applied, and to allow them only to do so in cases where the Act provided that they should be entitled to make an increased charge. Under the system of the Acts, for the purpose of estimating the increase which is justified, you have to estimate whether the landlord was liable for all the repairs or some of the repairs, and according to his liability for all the repairs or some of the repairs so by s. 2, sub-s. 1 (*d*), a maximum amount is fixed, or an estimate is to be made, if an agreement is not reached, as to how far there can be an increase. The words which are found in sub-s. 5 appear to be inserted for the purpose of interpreting the meaning of the word "repairs," and of the words "reasonable state of repair" which are found in sub-s. 2; and the phrase "landlord responsible for the repairs" is interpreted in the sense that the landlord is to be deemed responsible for any repairs for which the tenant is under no express liability; that is to say, if there is no express relief to the landlord in respect of the repairs he is to be deemed responsible for the whole of the repairs. One more section appears to be of importance, and that is s. 3 of the Act of 1923. That, together with sub-s. 2 of s. 2 of the Act of 1920, gives rights to the tenants whereby, if there has been an increase of rent on the basis of the landlord being liable for repairs and the landlord has not acted in accordance with that liability, remedies are given to the tenant to enable him, either to have the increase of rent suspended or to have the repairs enforced. But throughout the whole code laid down by these Acts there does not appear to me to be an implication that one is to take those Acts as incorporated into tenancies and to find an alteration of the relation between landlord and tenant which is to be implied from their terms. The Acts appear to me to have been passed alio intuitu.

It is true that in the case of *Jones* v. *Geen* (1), where Salter J. delivered a very careful judgment, the question whether the Increase of Rent, etc. (Restrictions) Acts have imposed a new liability upon landlords is considered, but the actual question that had to be determined there was whether or not the increase of rent that had been imposed upon the tenant was justified, having regard to the fact, as it was said, that there was not a liability for repair left upon the landlord. The decision of the Divisional Court was that under an agreement whereby the tenant had to keep and leave the premises in good and tenantable repair, fair wear and tear excepted, there still remained a measure of liability to repair upon the landlord; that he was not wholly excused from responsibility for repairs; and thus that there remained a portion of responsibility to the extent of which he was able to qualify himself for making an addition to the rent which he charged. The ultimate order that was made by the Court was that "the matter must go down to the county court judge to determine as best he can, in the light of what has been said here, what is the fair and reasonable amount of addition to the rent which the landlords are to be allowed to make." Taking the Increase of Rent, etc. (Restrictions) Acts at the highest, they would only impose a liability in respect of such repairs as would be required for the purpose of keeping premises in good and tenantable repair. Although in my opinion it would be necessary for any person, landlord or tenant, who was under a responsibility to keep premises in good and tenantable repair, to make good the cords of window sashes, yet I should find some difficulty under this statute or this liability in saying that, if a window sash broke, there was an immediate proof that the premises were not in good and tenantable repair, for the same reason that I stated with regard to the other statute, that the breaking of a window sash cord appears to be an incident which, even if premises are kept in good and tenantable repair, may occur by mischance from time to time, however careful or diligent either the landlord or the tenant may be in respect of that. On this question of liability, therefore, I am unable to agree with the presiding judge that there was imposed by either of these statutes a liability in respect of this mishap.

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(1) [1925] 1 K. B. 659.

There is, however, another and fatal objection to the plaintiff's claim. It has long been established law that where there is a covenant on the part of a landlord to keep the premises in repair, the tenant must give notice to the landlord of what is out of repair, for he, the tenant, being in occupation has an opportunity of knowing what the condition of the premises is, an opportunity denied to the landlord who may be at a distance; and on the principle which is stated by Lord Sumner in *Murphy* v. *Hurly* (1)—the maxim "Lex non cogit ad impossibilia"—it is necessary in order to attach responsibility to the landlord that notice should have been given to him. It is said, however, that although that is true, it applies only in cases where the landlord during the tenancy had no right of access to the premises, whereas here, by virtue of s. 1, sub-s. 2, of the Housing Act, 1925, the landlord was entitled on giving twenty-four hours' notice to the tenant to enter the premises for the purpose of viewing the state and condition thereof.

It is important, therefore, to consider what is the basis on which notice by the tenant is required, and is it required, although the landlord himself could have entered and viewed the premises? It is clear, I think, that we have to consider the addition of this covenant as implied in the contract of tenancy under the terms of s. 1 of the Act of 1920.

(1) [1922] 1 A. C. 369, 389.

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It is not more or higher than a covenant which might have been inserted in the contract of tenancy between the parties. The fact that its origin is statutory does not put it on higher authority. All that the statute says is that there is to be implied in the contract of tenancy a certain covenant, and the contract is to be read with that covenant inserted in it. Without going through all the cases which have been cited, it appears to me that notice is required whether or not the landlord has the means of access. That was determined by this Court in *Broggi* v. *Robins* (1), where Lord Russell of Killowen says: "Did he commit a breach of his contractual obligation merely because he did not repair in some case where the event proved that repairs had been necessary? Or was it necessary that his attention should be drawn to the fact that the premises were out of repair, and that repairs were needed?" and he holds that the latter proposition is the true one. He definitely holds in a case where there was, as there was here, a right of access, that notice is still necessary to draw the attention of the landlord to the fact. More than that, I think Mr. Singleton is right in the inference which he draws in reference to *Hugall* v. *M'Lean* (2), which is referred to by Lord Atkinson in his judgment in *Murphy* v. *Hurly* (3), and in which neither side knew (certainly the plaintiff, the tenant, did not know) of the faulty condition of the premises, but yet the landlord was held not to be liable owing to the absence of notice.

Finally, in *Murphy* v. *Hurly* (3) I think it is quite clearly laid down that in cases of this sort, as between landlord and tenant, it is essential that the landlord should have notice, even though he had means of access. I attach importance to the words of Lord Sumner (4): "the nature and the conditions of this rule are, however, equally well settled," that is to say that there must be notice, and the circumstances under which notice is necessary are "that the tenant is in occupation and the landlord is not," with the consequence that the tenant has means of knowledge while the landlord has no right of access. Then he goes on: "Perhaps I may add, that the repairs of dwelling-houses, however frequently required, are still casual and occasional." Taking those words with the subsequent words to which attention was called, it appears to me that in cases of this class where you have casual repairs necessary from time to time, but which, if the landlord was to discover them would throw upon him an unreasonable burden, it is the duty of the tenant to inform the landlord, if there is to be a responsibility in respect of a breach of his covenant enforced against the landlord. These three cases appear to me definitely to show that in this class of covenant in this class of case it is necessary that notice should be served upon the landlord. There was no such notice in the present case and, therefore, that is fatal to the plaintiff's claim. I would like to add, however, that I do not read the judgments in *Murphy* v. *Hurly* (1) as meaning that the rule to give notice is absolute in all cases. Lord Buckmaster calls attention to the fact that in certain circumstances there need not be a notice, as in the case they were actually considering, where the duty of the landlord was to keep under his eye the wall which was the cause of the injury which had there occurred, and I think the words of Lord Sumner are to the same effect; but although the rule may not be absolute in all cases I think it is in cases like the present; and, therefore, as there was no such notice, that notice being necessary in respect of the breach of covenant from whatever statute it is to be implied, the plaintiff's claim fails and the learned judge was wrong in disregarding the point that there was no notice. He did so because it was said that the cause of the injury was a latent defect. I find some difficulty in seeing whether or not that would be a sufficient answer. The question does not, however, I think, arise in the present case, for after *Hugall* v. *M'Lean* (2) and the way in which that is treated by Lord Atkinson I doubt very much whether the breaking of a window cord could be treated as a latent defect, within the meaning

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(1) (1899) 15 Times L. R. 224, 225.

(2) 53 L. T. 94.

(3) [1922] 1 A. C. 369.

(4) [1922] 1 A. C. 369, 387, 388.

(1) [1922] 1 A. C. 369, 387, 388.

(2) 53 L. T. 94.

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of any doctrine of a latent defect which may be imported to diminish the responsibility for sending notice.

For these reasons it appears to me that this appeal must be allowed and judgment must be entered for the defendants with costs here and below.

ATKIN L.J. I agree that the appeal should be allowed with costs, and I agree upon the only ground, unfortunately, upon which all three of us are agreed—namely, that notice is required before the liability of the landlord to repair in this case exists. The result is that we have embarked, and are embarking, upon a series of obiter dicta in respect of the other parts of the case, which I trust will be useful. but which so far as I can see will not be authoritative. Nevertheless, inasmuch as the case has been argued and the matter has been already dealt with, I propose to say something about all the points that have been raised.

The first point is on the alleged liability of the landlord under the Housing Act, 1925. That imposes a liability on the landlord to keep the house in all respects reasonably fit for human habitation. Those are words which (it is obvious) present difficulties when you have to apply them to concrete facts. It is, I think, relevant to consider the facts in this case. The plaintiff was a tenant from the Liverpool Corporation of a house which fell within the definition in the Housing Act, 1925; it consisted of a kitchen on the ground floor and a front and back bedroom above. In that house the plaintiff, a man of fifty, lives with six children. In September, 1925, an accident had happened with regard to the front window. One of the plaintiff's daughters was opening the top sash when it suddenly fell and injured her fingers. Eventually that damage was repaired by the corporation; no complaint of the injury was made and no action was brought in respect of it against the corporation. On February 15 of this year the plaintiff, who was then out of work, went to the back bedroom at about 11 o'clock in the morning and unlatched the top window sash which then fell down by reason of the cord giving way and crushed, and, as I gather, severely crushed, his hands which were on the top ledge of the lower sash. He had to go into hospital to have his hands bandaged; one hand was put in a splint, and he remained in that condition under treatment for about three weeks; he was then subjected to massage, and he says, and the learned judge has believed him, that the accident happened in that way, and that he suffered pain and suffering by reason of that accident. In addition to that calamity, which is to my mind a very natural result of the sash of a window of that kind falling suddenly, the man met with a rather more unexpected injury by reason of a pane of glass breaking during the fall and a small splinter getting into his eye; his eye was also slightly damaged as well and had to be treated. That is the damage, and those are the circumstances in respect of which the plaintiff brings his cause of action.

The question is whether or not the learned judge below was wrong in coming to the conclusion that that state of facts showed that the house was not in all respects fit for human habitation. I am bound to say, speaking for myself, that I am not satisfied that the learned judge was wrong in coming to that conclusion. It is, of course, in all the circumstances a question of fact, and while no one would say that the mere fact that one cord, or two cords for that matter, were broken necessarily put a house in a state in which it is unfit for human habitation, yet when you take into consideration the class of house and the people with whom you are dealing and the particular circumstances of the case, you may be forced to a different conclusion. The standard which was suggested by Mr. Batt in his argument is one which commends itself to me, which is that if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation. It seems to me difficult to say that that house in that state is reasonably fit for human habitation, and if that rule was the correct test, I think that the facts here bring the case

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within such a definition. For this purpose it is not merely a question of a window falling with such weight as a window sash has; one might test it by reference to any other thing that might be in a house, as, for instance, a gas lamp or gas chandelier or a gas bracket or a curtain pole or any other thing which on being touched might fall and might cause serious injury; and if the curtain pole was in fact part of the structure of the house, as it is conceivable it might be, and it fell within the ordinary repairing duty of the person who has to repair, I think that case also might very well fall within such a case as this.

There is another matter which has to be dealt with, and that is the question of health, to which I think the learned judge properly attached importance. If a man is the owner of a house which has many rooms and many windows, it may very well be that the fact that one window will not open easily, or open at all, would be far from making that house in any respect unfit for human habitation. But when you are dealing with a working class house with two bedrooms occupied in the ordinary way in which an industrial dwelling may be occupied, that is to say, by a man and his wife and children, it appears to me that the question whether or not the only window in one of the only two bedrooms is capable of being opened with reasonable facility, and if not opened will have to remain shut, has a bearing upon the question whether that room is reasonably fit for human habitation.

Then another thing which I think does test the matter is this. After the window has fallen and the sash cords have proved to be insufficient, is there or is there not an obligation upon the landlord of the house to repair the sash cords? That obligation was answered in this case in practice, because as soon as that happened, the corporation in fact did the repairs. They are not bound to do the repairs except under this section, and though that, of course, is not conclusive, because a good landlord may very often do repairs that he is not under a contract bound to do, especially when there is no obligation on the tenant to do the repairs, it seems to me to have quite a bearing on the case by way of a test,

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and it seems to me that if after notice in such a case the landlord refused to repair the window so that it could not be raised in these circumstances with ordinary facility, there certainly would be evidence that that house was left by the landlord in a state not in all respects reasonably fit for human habitation. I also think it not immaterial to notice that the tenant himself is prohibited from executing slight repairs or is restricted in his right of doing slight repairs, because he himself is restricted by the regulations from driving any nails into any woodwork in the house, and it appears that the only way in which this window was made available for some time was by driving nails into some part of the window sash. In my judgment the learned and very experienced judge in the Court of Passage is not shown to have been wrong when he came to this conclusion of fact at the trial.

But then it is said that in addition there was a further obligation than the obligation under the Housing Act, and that the Increase of Rent, etc. (Restrictions) Act, 1920, imposed, I think for the first time, a statutory obligation on the landlord of any house which came within that Act to keep that house in good and tenantable repair, and imposed upon him a statutory obligation towards the tenant. It is said, therefore, that we need not consider the question whether this house was in all respects fit for human habitation; all that we need to consider is whether it was or was not in good and tenantable repair. This, it is conceded, and I think it clear, is a more onerous obligation than the first obligation.

I am not prepared to accept the view that the Increase of Rent, etc. (Restrictions) Act, 1920, did in fact in s. 2, sub-s. 5, impose that obligation upon the landlord towards his tenants. The matter arises in this way. By that Act of 1920—I say nothing about the previous Acts—the landlord is entitled to make additions to his rent by complying with the statutory conditions, and he may, by s. 2, sub-s. 1 (*d*), increase the amount of rent of a dwelling-house beyond the standard rent in this way: "(i.) where the landlord is responsible for the whole of the repairs, an amount not exceeding twenty-five per cent. of the net rent; or (ii.) where the landlord is responsible for part and not the whole of the repairs, such lesser amount as may be agreed, or as may, on the application of the landlord or the tenant, be determined by the county court," and then sub-s. 5 provides: "For the purposes of this section," it is not a general provision, but "For the purposes of this section, the expression 'repairs' means any repairs required for the purpose of keeping premises in good and tenantable repair, and any premises in such a state shall be deemed to be in a reasonable state of repair, and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability." To my mind that is only a statutory answer to the question which must be asked in the first place when you are seeking to decide whether a landlord may increase the rent or not—namely, whether the landlord is responsible for the whole of the repairs or for part of the repairs, and the Act says: "We will answer that by saying that for the purpose of this section the landlord is deemed to be responsible for any repairs for which the tenant is under no express liability." That appears to me to be very far from creating a statutory liability on the landlord to the tenant. That is not the question which is arising here. We want to define the state of circumstances which by the Act is a condition precedent to the right of the landlord to increase the rent. It is only where he is responsible for the repairs that he may increase the rent at all. Now in the ordinary case, in the bulk of the cases which come within the Increase of Rent, etc. (Restrictions), Act the landlord is under no contractual obligation to the tenant to do any repairs at all; nobody has contracted to do any repairs, and the only liability that the landlord would be under would be a possible implied agreement—and whether that exists or not there is some controversy, but a possible implied agreement—to keep the premises watertight. I am far from saying that that exists, but that would be the extent of it. I think that all this Act meant was: You want to find out on whom the burden of repairs falls, whether it falls on the landlord or not; if it falls on the landlord, he may increase the rent, because if it falls on him, then the reason for the increase of rent exists—namely, the increased cost of labour and the increased cost of material, and it is extremely important to give him facilities for repairing because, after all, the tenant is going to benefit by it. Then there is a series of provisions, which are very carefully drawn, by which if the landlord, being so defined to be responsible for the repairs, does not in fact execute the repairs after he has increased the rent, then the tenant need not pay the increased rent, and he does that by getting a certificate from the sanitary authority saying that the house is not in the state of good and tenantable repair which is mentioned in the statute. I cannot think that the Act of Parliament in those terms, for the first time in 1920, was doing something to the effect of imposing a statutory obligation in excess of the existing obligation or existing contracts of tenancy upon a landlord towards the tenant. It would be very odd, if it were so, that the Act does not in one way or another give effect to the remedy that the tenant would then have, not so much in not paying the increase of rent, but in claiming damages for breach of the covenant to repair. Therefore, to my mind it is wrong to suggest that s. 2, sub-s. 5, which is carefully limited to a particular provision by the words "for the purposes of this section," does in fact impose upon the landlord a liability towards his tenant, and, if that is so, then this further obligation does not exist.

Having disposed, therefore, of the two contractual terms, and having come to a conclusion as I do that the only clause that binds the landlord is the clause in the Housing Act, then comes the question whether or not that is enforceable. The clause in the Housing Act is imposed as a contractual term and as such it appears to be only available to the tenant because it is a term of the tenancy. The case of *Cavalier* v. *Pope* (1) would prevent an occupier who was not a tenant from taking advantage of a breach of the contract. It is merely a statutory term of the contract. If it had been an express term I think there would be

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(1) [1906] A. C. 428.

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no doubt that in ordinary circumstances the obligation of the landlord to do repairs does not come into existence until he has had notice of the defect which his contract to repair requires him to make good. The reason for that is obvious. The landlord has given the tenant exclusive occupation of the house. The landlord, therefore, is not in a position to know whether the house is in repair or out of repair, and it is held that it would be quite contrary to justice to impose an obligation to repair of this kind upon a landlord in respect of matters of which he has in fact no knowledge. It appears to me that the reason for reading in that condition depends, and depends in truth and in fact, solely upon that consideration; he has given the exclusive occupation of the house to his tenant and he himself does not know, and, more than that, he has not the means of knowledge. The result is, to my mind, that in all cases of that kind, speaking generally, it is a condition of the liability of the landlord that he should receive notice of the repairs. Any other view would certainly impose a very considerable hardship upon the landlord, as is illustrated by this case. Here is a case of something which arose quite suddenly. It is possible that a very careful inspection of the window cords might have revealed the state in which they were, but there are many other defects which arise quite suddenly, leaks quite suddenly spring up in joints of water pipes and gas pipes, and so on, and to say that the landlord is responsible for the consequences of those not being in repair in circumstances in which no time could have elapsed between the time when the defect first arose and the time when the injury from it occurred, would certainly be to impose a very harsh obligation upon a landlord which the Courts do not impose except subject to a condition that he must receive notice of the defect. To my mind in those circumstances it is clear that, if the landlord gives the exclusive occupation to the tenant, the landlord does not in fact know, and in this case could not know of the defect. It is true that he has a right of access given to him by the Act—and I think he has stipulated for perhaps a larger right of access in the terms of the

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tenancy—that is to say, he may come upon the premises at any time after twenty-four hours' notice to inspect the state of repair; but such acts as that, though useful to the landlord and to the tenant to enable the landlord to repair defects which arise from time to time, are quite insufficient to redress the injustice that would arise from imposing this obligation upon the landlord. Indeed it could not be of any value unless the landlord lived on the premises to the same extent that the tenant did. As I said before, I cannot imagine a set of circumstances which would be more intolerable to a tenant, to say nothing of the landlord, if the landlord had repeatedly day by day and so on, in order to protect himself, to survey all his houses for the purpose of seeing whether there was any little defect which might result and cause injury. I think the power of access that is given, extensive though it may be, does not take the case away from the principle from which the Courts have inferred the condition that the liability is not to arise except on notice. The position is quite a satisfactory one, because as soon as the tenant is aware of the defect he must then give notice, and if the landlord does not repair it, the landlord will be liable. If in fact the tenant is not able to ascertain the defect, there seems to be no reason why the landlord should be exposed to what remains still the same injustice of being required to repair a defect of which he does not know, which seems to me to be the real reason for the rule. This was a case in which notice was not given to the landlord. As I have said, it appears to me that, as soon as the defect became so known by the fall of the sash, the tenant was able to give notice to the landlord and did give notice. In my view the landlord then became under a liability to repair in the circumstances of this case, because if he did not, the house would be in a state not in all respects fit for human habitation; but as no notice was given, I think the landlord was not liable. I think precisely the same rule would be applied if the true view were, which I think it is not, that there was a statutory obligation on him to repair imposed by the Increase of Rent, etc. (Restrictions) Act, 1920.

For these reasons it appears to me that the appeal must be allowed with costs, and judgment entered for the defendants with costs.

LAWRENCE L.J. I agree. The learned presiding judge has found that because the window cords of the windows in the back room of the house in question were defective and suddenly broke, therefore the house was not in all respects reasonably fit for human habitation within the meaning of s. 1 of the Housing Act of 1925. I find myself quite unable to concur in this finding. Salter J. in the case of *Jones* v. *Geen* (1) states that the requirements of the section demand that the house should be decently fit for human beings to live in. Personally, I am content to take the expression as it stands in the section without attempting to paraphrase it or further to define it. Moreover, I feel disinclined to attempt to state what circumstances might or might not constitute a breach of the condition or undertaking implied by reason of s. 1 of the Act. I desire, however, to express my emphatic opinion that the defective condition of the cords of the window in question did not render the house in any respect unfit for human habitation within the ordinary acceptation of that expression. The utmost that in my opinion could be said was that the back room was rendered less comfortable and that in order to have complete enjoyment of it the broken window cords would have to be replaced by new cords. But it seems to me, with the greatest respect to those who hold a different view, that to say that therefore the house was in some respects unfit for human habitation is somewhat fantastic. Such a slight want of repair as a defective window cord or defective window cords cannot, and does not, in my opinion, constitute a breach of the undertaking mentioned in s. 1 of the Act.

In my opinion, however, this does not dispose of the case. Mr. Batt contended that the corporation was under liability to the tenant to keep the house in good and tenantable repair either under an implied term of the contract of tenancy, or under s. 2 of the Increase of Rent, etc. (Restrictions) Act, 1920. If the corporation is so liable I agree with the contention

(1) [1925] 1 K. B. 659.

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that such a liability would include a liability to repair the broken window cords, but I find no sufficient evidence to support any liability under the terms of the tenancy agreement. On the question whether such liability is imposed by the Act of 1920 I regret to say that I do not see eye to eye with the Master of the Rolls and Atkin L.J. As at present advised, I am of opinion that the corporation under the circumstances was made liable to the tenant to keep the property in good and tenantable repair by virtue of s. 2 of the Act of 1920, and if the fate of this appeal had depended on this question I should have desired further time to consider that point. As, however, in my opinion it does not so depend, there is no reason for me to express a final opinion upon that question. It seems to me, whether the liability be one which arises under the Housing Act of 1925, or under the Act of 1920, the question whether such liability arises, or can be enforced against the corporation without first having given the corporation notice of the defect, is the same.

On the question of notice I am in complete agreement with the judgments delivered by the Master of the Rolls and Atkin L.J. and have very little to add. In my opinion the established rule is that the obligation of the landlord to keep the premises in repair is not broken unless notice has been given to him of the want of repair, and that mere knowledge is not sufficient to saddle the landlord with liability. The foundation of such rule is that the tenant in occupation is generally in a far better position to know of any want of repair. I am further of opinion that for the reasons stated by Atkin L.J. the rule applies to latent as well as to patent defects, and certainly applies to the defect which existed in the present case.

I agree that this appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors for appellants: *F. Venn & Co., for Walter Moon, Town Clerk, Liverpool.*

Solicitors for respondent: *Attenboroughs, for R. Barrow-Sicree, Liverpool.*

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Jan. 11, 12, 13, 14, 17, 18; *Feb.* 21.

[IN THE COURT OF APPEAL.]

In re RAILWAYS ACT, 1921.

MANCHESTER SHIP CANAL COMPANY'S AND DOCK AND HARBOUR AUTHORITIES ASSOCIATION'S APPLICATIONS.

Railway—Standard Charges—Charges in respect of Business ancillary or subsidiary to Railway—Docks—Warehouses—Railways Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 55), *s.* 58, *sub-s.* 4.

Sect. 58, sub-s. 4, of the Railways Act, 1921, provides that: "When fixing the charges necessary to produce the standard revenue, the Tribunal shall take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal, and if in the opinion of the Tribunal the company is not making, or has not taken reasonable steps to enable it to make, adequate charges in respect of any such business, the Tribunal shall, in fixing the charges under this Part of this Act, take into account the revenue which would be produced by any such business if adequate charges were in operation."

In dealing with the subject of dock undertakings belonging to railway companies the Railway Rates Tribunal accepted the division between "railway" and "dock" set out in the railway companies' estimates, by which all receipts and expenses in respect of railways, sidings and warehouses, whether they were within the area of a dock or not, were treated as "railway" receipts and expenses, and all receipts and expenses in respect of "docks" other than those entered as "railway" receipts and expenses, were treated as "dock" receipts and expenses:—

Held, by the Court of Appeal, that this division of receipts and expenditure between railways and docks could not be supported, as it involved the exclusion from consideration of charges at dock warehouses or storage spaces where none of the goods stored therein used railways, and all charges in respect of conveyance on railways in docks in whatever circumstances the rails were laid or charges were made for their use.

Per Bankes L.J.: Under s. 58, sub-s. 4, of the Railways Act, 1921, the Tribunal has to take into consideration the different operations which go to make up the business of a dock undertaking, for which operations separate and distinct charges are made.

Semble, per Scrutton L.J.: Warehousing on a dock undertaking goods exported or imported, storing such goods in the open on dock lands, the use of transit sheds, and services such as coopering, are dock and not railway charges.

Decision of Railway Rates Tribunal reversed.

Appeal from a decision of the Railway Rates Tribunal.

By the Railways Act, 1921, the net annual or standard revenue of the respective amalgamated companies was to be obtained from two sources—namely, railway charges and other sources of revenue. What other sources did not supply railway charges had to make up. To enable the Tribunal to estimate what amount "other sources of revenue" would contribute to the revenue of the A or notional year, each of the amalgamated companies deposited its "Estimate of Revenue from Other Sources for 'A' year," marked respectively R. T. 2c (London and North Eastern Railway Company), R. T. 3c (London Midland and Scottish Railway Company), R. T. 4c (Great Western Railway Company), and R. T. 5c (Southern Railway Company). These contained estimates in respect of what the Act of 1921 referred to as a company's "ancillary or subsidiary businesses," those, namely, which the company carried on in connection with, but outside the scope of, its main railway business, such businesses, for example, as those connected with their hotels, steamboats, docks and harbours. In connection with these estimates of revenue from "ancillary and subsidiary businesses," s. 58, sub-s. 4, of the Railways Act, 1921, provided as follows: "When fixing the charges necessary to produce the standard revenue, the Tribunal shall take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal, and if in the opinion of the Tribunal the company is not making, or has not taken reasonable steps to enable it to make, adequate charges in respect of any such business, the Tribunal shall, in fixing the charges under this Part of this Act, take into account the revenue which would be produced by any such business if adequate charges were in operation."

At the hearing before the Tribunal objection was taken by various bodies, including the Manchester Ship Canal Company and the Dock and Harbour Authorities Association, to the adequacy of the charges in respect of "docks, harbours and wharves," on the ground that certain properties, receipts and expenses which should have been included in the estimates and accounts relating to "docks, harbours and wharves" had been improperly withdrawn from those estimates and accounts and included in those relating to "railway working." The railway companies in making out their estimates and accounts treated all receipts and expenses in respect of railways, sidings and warehouses, whether they were within the area of a dock or not, as "railway" receipts and expenses, and all receipts and expenses in respect of "docks" other than those entered as "railway" receipts and expenses, as "dock" receipts and expenses. In the case of Southampton, however, owing to an "inclusive" charge, including haulage over railways, having been fixed by statute as a "dock charge," the practice was to enter this inclusive charge as a "dock charge." The net result was that in all cases but Southampton the business referred to in accounts for "docks, harbours and wharves" was a business from which railway, siding and warehouse charges and expenditure were excluded.

The Tribunal accepted the estimates of "other sources of revenue" as satisfying the requirements of the Act, and proceeded to consider under s. 58, sub-s. 4, the charges in the "docks, harbours and wharves" businesses therein referred to as charges in "ancillary or subsidiary businesses" over which the Tribunal had no jurisdiction.

On behalf of the Dock and Harbour Authorities Association and the Manchester Ship Canal Company it was said that amongst the transfers made to "railway" account there would upon examination be found some transfers to "railways" account of receipts and expenses and capital expenditure respectively in connection with railways which had been originally constructed and since continued within a dock area and as part of the equipment of the dock and under what might be called "dock" powers; and further, that there would also be found cases where upon amalgamations of "dock" and "railway" undertakings, the "dock," although passing into the proprietorship of the same company as owned the "railway," had been preserved as a separate entity with separate accounts and distinct statutory provisions applicable to each. It was thereupon contended that in such cases, however innocuous the transfers from dock to railway might have been before the Act of 1921, they could not now be continued; that the Act by the term "ancillary or subsidiary business" meant the entire ancillary or subsidiary business as it was originally created or had been continued by statute; that these ancillary or subsidiary businesses must be re-created by re-transfers; and that this was especially necessary in view of the competing harbours and docks authorities, inasmuch as until these re-transfers were made the Tribunal could not tell whether a dock was self-supporting, which it was urged it was the Tribunal's duty under s. 58, sub-s. 4, of the Act to ascertain.

The Tribunal did not accept those contentions. In their opinion, Parliament, when passing the Railways Act, 1921, must be assumed to have had knowledge of the Railway Companies (Accounts and Returns) Act, 1911, the statutory form of accounts thereunder, and the established practice in connection with it, which proceeded upon the broad basis of "railway revenue" and "other sources of revenue," i.e., other than railway, meaning thereby, in their opinion, what was at the time of the passing of the Act of 1921 known as "railway" revenue, and what was known as "other sources" of revenue. Although the objectors' evidence showed that circumstances existed which combined to reduce the interest yield on railway docks below that which was obtained at certain other docks, it did not identify the prevailing scale of charges as the cause of it, and still less did it show that the charges were "inadequate" within s. 58, sub-s. 4. The Tribunal accordingly were not prepared to find that in respect of the business of the "docks, harbours and wharves" of the respective companies, the companies were not making, or had not taken reasonable steps to enable them to make, reasonable charges. In their opinion the intention of the sub-section was to prevent an available source of additional revenue being disregarded on the part of railways, and to impose the prescribed penalty where it was found that they were not making charges commensurate with or equal to the highest effective charges that they could make; but in the Tribunal's opinion if the charges in force were, as here, the highest that could legally be made, they could not be held to be "inadequate."

The Manchester Ship Canal Company and the Dock and Harbour Authorities Association appealed.

Sir John Simon K.C. and the *Hon. R. Stafford Cripps* for the Manchester Ship Canal Company. In considering this question the history of docks and railways has to be borne in mind, and, particularly, the fact that docks are very much older than railways. Although many of the dock undertakings have been acquired by railway companies, Parliament has sought to ensure that non-railway docks should not suffer unfairly because of the opportunity which railway companies have of diverting business to their own docks. If railway companies were at liberty to make the charges in connection with their own docks unduly low in order to attract business to their railways and then recoup themselves out of the general railway revenue, other dock companies would be unfairly prejudiced. If, for example, a Bradford merchant were considering whether he would send his goods for shipment to Hull or Manchester, he would say to himself: "I see that the Hull charges are extremely low and the Manchester charges much higher; I will therefore send my goods to Hull"; but the real reason for the Hull charges being less might be, not that the work there was done more cheaply, but because the railway company owning the Hull docks could make up any loss on the dock undertaking out of its general revenue. Sect. 58, sub-s. 4, of the Railways Act, 1921, is to ensure that railway companies shall make adequate charges for their ancillary businesses, and these include their docks. In dealing with this question the Tribunal wrongly limited the dock undertakings of the railway companies to the water space, the quays, and to a limited extent the warehouses, excluding altogether the services rendered on the lines of rail within the dock areas. The whole scheme of the Act is against this construction. The rails are part of the docks. The accounts accepted by the Tribunal were not drawn up in accordance with any established practice, seeing that the only accounts under the Railway Companies (Accounts and Returns) Act, 1911, previous to the Act of 1921, were in 1913. The Tribunal wrongly attributed importance to the form of the accounts and to the distinction made therein as to railway and non-railway charges.

[They referred to the various Hull Dock Acts, the Harbours, Docks and Piers Clauses Act, 1847, the Railways Clauses Act, 1847, and the London and North Eastern Railway (Dock Charges) Act, 1924.]

Craig Henderson K.C. and *John Forster* for the Dock and Harbour Authorities Association adopted the argument advanced for the Manchester Ship Canal Company, and called attention to the statutes relating to the Southampton and Newport Docks for the purpose of showing that in these the Legislature made a clear distinction between dock charges and railway charges.

Tyldesley Jones K.C., *Bruce Thomas* and *Alfred Tylor* for the railway companies. The Railway Rates Tribunal on complying with the directions of s. 58 of the Railways Act, 1921, is free to adopt any method for the purpose of arriving at the proper scale of charges under s. 31, and, if in the performance of this duty, the Tribunal made an incidental mistake in law which could have no effect on the result this Court will not interfere. This Court will have regard to the substance of the order made and, as Lord President Robertson said in *North Eastern Ry. Co.* v. *North British Ry. Co.* (1) in the analogous case of an appeal from the Railway and Canal Commission, the Court of Appeal "will not be prone to search for or to discover legal questions, and the incidental expression of opinion on legal rights would not let in an appeal." Here the Tribunal was settling the schedule of charges, not determining how the accounts have to be kept; the accounts themselves settle nothing; they were merely prepared to enable the Tribunal to arrive at the schedule of rates. The mere fact that the accounts may have been, on certain points, made out on a wrong basis, will not vitiate the Tribunal's order in which allowance is made for possible errors. Sect. 58,

(1) (1897) 10 Rail. & Can. Traff. Cas. 82, 114.

sub-s. 4, of the Act of 1921 has for its object the protection of railway users, not of competitive dockowners. If the Tribunal was satisfied that dock rates were such that they could not be raised without a loss of business, it properly discharged its function in so holding even though the delimitation as between docks and railways might be a little indefinite in certain respects. The "adequacy" of charges cannot be determined by simply saying that to give a proper return on the amount of capital invested in a dock so much revenue is required and if the charges do not produce that amount they are inadequate. If the Tribunal had evidence before it, which it had, that the charges at the docks were either the maximum allowed by statute, or that if they were increased less business would result, the Tribunal was justified in acting on that evidence, and even if there are small errors of law which do not affect the financial result this Court will not interfere. There is no justification for the proposition that all property that came to the railway companies as docks is to be treated as docks, and that the revenue therefrom must be treated as dock revenue.

[They referred to *Attorney-General* v. *North Eastern Ry. Co.* (1)]

Bowstead for the Minister of Transport.

Craig Henderson K.C. replied.

Cur. adv. vult.

Feb. 21. The following judgments were read :—

BANKES L.J. These appeals are from a decision of the Railway Rates Tribunal, a statutory body set up by the Railways Act, 1921, for the purpose, among other things, of settling the schedule of standard charges which the railways as from the appointed day may make for all services rendered in respect of which the charges are fixed. By s. 26 of the Act the same right of appeal is given as was conferred as to appeals from the Railway and Canal Commission by s. 17 of the Railway and Canal Traffic Act, 1888, which right includes the right to appeal upon any question of law.

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(1) [1906] 1 Ch. 310; [1906] 2 Ch. 275.

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The Railways Act, 1921, lays down a number of principles and rules which the Tribunal is to follow in settling the schedules of charges. It is obvious that in the course of deciding how far the schedules submitted by the railway companies do, or do not, comply with the statutory requirements of the Act, and in deciding from what point of view the Tribunal is to approach the consideration of those schedules, questions of law must continually arise. The Tribunal appears to be under no obligation to give any intimation as to what decision it may have arrived at on any question of law, or to give any reasons for its decision. It is, however, manifestly to the interest of all parties concerned that when an important question is raised upon which either the Tribunal, or the parties interested, desire the decision of this Court, the Tribunal should state what its decision is, and the reasons for it, so as not only to give a right of appeal, but also to inform this Court what the grounds of the decision were.

In the present case this has been done, and the Tribunal on March 30, 1926, gave a judgment which in the form of an order and declaration was drawn up and issued on May 28. It is from this decision (because after all it is merely a decision) that the present appeals are brought.

The appellants are the Manchester Ship Canal Company and a body representing dock interests who appeared before the Railway Rates Tribunal as interested parties. Their present complaint is that the Tribunal put a wrong construction upon certain directory provisions of the Railways Act, 1921, with the result that they, as independent dock companies competing with railway-owned dock undertakings, are placed in a much less favourable position than under the Act they are entitled to be put. The whole question turns upon the proper construction to be placed upon s. 58, sub-s. 4, of the Act, which is in the following terms: "When fixing the charges necessary to produce the standard revenue, the Tribunal shall take into consideration the charges in respect of any business carried on by the company ancillary or

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subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal, and if in the opinion of the Tribunal the company is not making, or has not taken reasonable steps to enable it to make, adequate charges in respect of any such business, the Tribunal shall, in fixing the charges under this Part of this Act, take into account the revenue which would be produced by any such business if adequate charges were in operation." The construction of this sub-section was considered by the Tribunal in a judgment delivered on December 1, 1925. The question then before them had reference to the charges made by railway companies for collection and delivery and for warehousing. In reference to the latter it had been contended, as it was contended in the present appeal, that s. 58, sub-s. 4, was a protective section inserted by Parliament in the interest of the independent dock companies. The Tribunal refused to accept that view. The President said: "This sub-section seems to be in aid of the person called upon to pay the standard charges and to be designed to prevent him from being called upon to pay charges which contain an element of subsidy of certain other businesses which the railway companies may be carrying on. It assumes that he will be doing so if the charges in these businesses are inadequate." I agree that this is the primary object of the statute, the terms of which, taken as a whole, plainly indicate in my opinion that Parliament had in mind in framing its provisions two parties—namely, the railways who perform the services, and the public who pay for them. It seems unnecessary to decide whether Parliament also had in view the position of the independent dock companies, because their interest in questions such as are raised in the inquiry before the Tribunal is such as clearly to entitle them to the locus which was granted them in the present case to appear as opponents to the railway companies' proposals and to claim that the true construction must be placed upon the sub-section, whether it was inserted in the statute with the object of protecting their interests or not. In order to follow the subsequent proceedings before the Tribunal reference must be made to the decision of December 1, 1925. It was in the following terms: "That for the purpose of fixing standard charges under the Railways Act, 1921, (*a*) collection and delivery is a business carried on by the said railway companies, as ancillary or subsidiary to their respective railways. (*b*) Warehousing as now undertaken by the said railway companies in connection with their respective railways (including the provision of accommodation for storage under fixed space agreements) is a part of railway working and is not a business carried on by them ancillary or subsidiary to their respective railways. 2. That the charges in respect of the aforementioned business of collection and delivery are not charges which are not subject to the jurisdiction of the Tribunal within the meaning of s. 58, sub-s. 4, of the Railways Act, 1921, the adequacy of which the Tribunal can, under the said sub-section, take into consideration in fixing standard charges. And the Court doth further order: (1.) That the expenses of collection and delivery (Abstract F.) be omitted from the respective companies' estimates lodged with the Court and marked respectively"—then the marks are given—"and be transferred to their respective estimates"—then the marks of those are given—"(2.) That to enable the Tribunal to fix the standard charges the said railway companies do from time to time as required furnish to the Tribunal accounts showing the properly ascertained receipts and expenditure from and on the services of collection and/or delivery as performed by them." Although warehousing was dealt with, as appears in the order, the question then before the Tribunal was warehousing in general. At a later stage the question of warehousing on dock premises was raised, and argued before them. On this question they came to the decision of March 30, 1926, which is the subject of the present appeals. The decision of December 1, 1925, has not been appealed from. In order to follow the form of the order of March 30, it is necessary to refer to the case presented to the Tribunal and to the arguments addressed to them in support of it. This very clearly appears from the speech of Mr. Cripps, appearing for the Manchester Ship

Canal Company. He commenced by setting out the points to which he desired to call attention and said: "There are two points which in my submission arise here on the consideration of 'other sources of revenue.' The first is the definition of 'ancillary business,' and the second is the adequacy of the charges, and that second point divides itself into two, firstly, the meaning of 'inadequate,' and, secondly, whether on the proper interpretation of the word 'inadequate' the charges are in fact inadequate. So far as my clients are concerned they are particularly concerned to get the proper legal interpretation on the first two points. They submit on the facts shown that the charges are not adequate; but that is not a point which so vitally concerns them; the point which vitally concerns them is what they consider the final determination now of the Tribunal as to 'ancillary business,' because when the Tribunal comes to consider s. 59, sub-s. 6, they feel that the Tribunal will be bound by the decision which they now give as to the ambit of those ancillary businesses. I do not suggest that at this stage it would be profitable for the Tribunal to go into the details of each dock and settle the exact ambit of it, but on the other hand, knowing as we do that at the present time the form of this account is under revision by the Minister and the railway companies, it is obviously a very opportune moment for the Tribunal to give their decision on the point as to what an ancillary business is so that the railway companies and the Minister may have the assistance of that decision when they come to re-cast their accounts under the Act." He then proceeded to contend that in construing the sub-section in reference to docks, the entire business of the dock must be considered as the business carried on by the company referred to in the sub-section, and that it is not legitimate to split up that business into warehousing, cooperage, etc., and treat each branch of the business as a business for the purposes of the sub-section; and, further, that in determining what the business of the dock is, the ambit of that business must be determined by a consideration of the statutes creating the dock undertaking. It followed from that contention, and it was freely admitted by Mr. Cripps, that no general rule could be framed applicable to all docks, because the case of each dock must depend upon its own particular statutes. His proposal to the Tribunal appears in these words: "What I propose to do is to examine one series of Acts, in order to give my learned friend, Mr. Bruce Thomas, an opportunity of criticizing my argument which I put forward upon them, and if this Tribunal should lay down some such principle as that an ancillary business is a business defined by statute in which the charges are not subject to the jurisdiction of the Tribunal I should suggest that then the whole matter might easily be referred to some person, perhaps the Minister of Transport, to decide in the case of each dock what was the ambit of the dock undertaking, with power to Parliament perhaps to refer it for report to this Tribunal in case there is any insuperable difficulty; but as I anticipate, once the legal position is ascertained by this Tribunal the parties will probably have no great difficulty in themselves agreeing the actual ambit of the various docks." After discussing the provisions of the Hull Dock Acts at length, he proceeded to deal with the question of law arising upon what is the meaning in the sub-section of the expression "adequate charges," which he construed as meaning charges sufficient in amount to defray the cost of the services and to give some reward upon capital, and he dealt with the contention that the railways are relying upon their charges being maximum charges, and he completed his case with a contention that the railway companies had not complied with the order of the Tribunal of December 1, 1925, directing them to furnish accounts of collection and delivery services. The order appealed from is in the following terms: "The Court doth order and declare as follows: (1.) That for the purpose of fixing standard charges under the Railways Act, 1921, (*a*) The estimates of other sources of revenue for the respective companies aforesaid as set forth in the tables R. T. 2c, R. T. 3c, R. T. 4c, and R. T. 5c, conform to and satisfy the requirements of the Railways Act, 1921, and be accepted. (*b*) That the ancillary or subsidiary businesses of docks, harbours and wharves carried on by the several companies aforesaid, are not businesses in which the several companies are not making or have not taken reasonable steps to enable them to make adequate charges in respect of any such businesses. (*c*) That that portion of the said estimates relating to joint lines and to collection and delivery be accepted." I understand the last clause to have reference, in part at any rate, to Mr. Cripps' complaints that the accounts rendered by the railway companies were not in order, and this is confirmed by para. 4 of the notice of appeal of the Manchester Ship Canal Company. Nothing has been said in reference to this part of the appeal, and I pass from it to consider heads (*a*) and (*b*) of the order and paras. 1, 2 and 3 of the notice of appeal.

The way in which the Tribunal dealt with the arguments addressed to them appears from their written judgment, to which I must refer. They set out the capital expenditure of the four railways upon their dock undertakings and go on to say that, except in the case of the Southampton Docks, the figures do not include any expenditure on railways sidings and warehouses. They then go on to explain that the railway companies have adopted a division of railway receipts and dock receipts, by which all receipts and expenses in respect of railways sidings and warehouses, whether they were within the area of a dock or not, are included as railway receipts. They treat this division as a satisfactory compliance with the requirements of the Railway Companies (Accounts and Returns) Act, 1911. They then proceed to set out the objections of the present appellants to the course adopted by the railway companies, and they give their decision in the following words: "In our opinion Parliament, when passing the Railways Act, 1921, must be assumed to have had knowledge of the Railway Companies (Accounts and Returns) Act, 1911, and the statutory form of accounts thereunder and of the established practice in connection with it, and in providing the methods which the Act contains for ascertaining railway charges must be deemed to have kept these statutory provisions as to accounts, and the practice which had been established under them in view and to have utilized the division of receipts and expenses which it contained as the basis upon which the provisions of the Act as to fixing charges should proceed. This, we think, appears upon a consideration of the terms of the Act of 1921." It is not disputed that this decision is based upon a misapprehension. There was not at the time of the passing of the Railways Act, 1921, any settled practice; only one set of accounts under the Act of 1911 had been delivered before the war, and with regard to that one set the practice was not uniform. No accounts were rendered during the war, or until after the passing of the Act of 1921. It follows that the Tribunal have, for a reason which cannot in law be supported, declined to take into consideration the matters submitted for their consideration by the appellants, and unless their decision can be supported on other grounds the appeal must be allowed.

Mr. Tyldesley Jones for the respondents attempted to support the decision upon the ground that all the charges to which reference could be made were subject to the jurisdiction of the Tribunal. In support of this contention reference was made to s. 28, sub-s. 1 (*f*), s. 59, sub-s. 6, and Sch. V., para. 11. It was further contended that s. 58, sub-s. 4, was confined to the first fixing of standard charges, and, that being so, no meaning could be given to the part of the sub-section referring to jurisdiction unless it was read as including the jurisdiction conferred by s. 28, sub-s. 1 (*f*), and Sch. V., para. 11. I do not agree with this contention. In my opinion the jurisdiction conferred by s. 28, sub-s. 1 (*f*), not being exercisable until the appointed day, and then only for the purpose of determining questions brought before the Tribunal, is not the jurisdiction which is referred to in s. 58, sub-s. 4. Whether the draftsman had in his mind any particular form of exercise of jurisdiction when he drafted the sub-section, or whether it was introduced merely as a matter of drafting because sub-ss. 1 (*a*), (*g*), (*h*) and (*i*) were not subject to the same restriction as sub-ss. (*b*) to (*f*), I do not know. It seems to me, however, clear that when the statute expressly provides that certain powers of the Tribunal shall not be exercisable until the appointed day, it cannot mean that before that time the jurisdiction though not exercisable shall be deemed to be existing.

Mr. Tyldesley Jones made a further appeal to the Court not to send the matter back to the Tribunal on grounds which it is unnecessary to go into, but which amounted to an appeal to us to exercise a discretion in the matter. Sir John Simon relieved us of any necessity to consider this question, as he stated quite early in his argument that his clients had no wish to compel the Tribunal to reconsider at the present juncture the decision thay had come to, the object of the appeal being to make it quite clear that on any future consideration of the questions involved the Tribunal must not follow their present decision, but must deal with the questions afresh, and on entirely different lines.

How far the considerations which are material when s. 58, sub-s. 4, controls the situation will continue to be material when s. 59, sub-s. 6, is the controlling section I express no opinion. The question has not been argued. I merely call attention to the difference between the language of the proviso to s. 59, sub-s. 6, and that of s. 58, sub-s. 4.

It remains now to consider how far, if at all, it is possible to lay down any rule of construction which will guide the Tribunal in the future. This at least is clear, the Tribunal must reconsider their decision. The appellants ask us to accept their test of what are railway and what are dock charges, and to decide as a matter of law that it is the correct test. I take the appellants' contention from their notice of appeal as supplemented by the draft form of order which Sir John Simon asked this Court to make. In substance it amounts to this, that in the case of a dock undertaking, taken over, or acquired, by a railway company the deciding and conclusive test of what is railway service and what is dock service is whether the service has been performed within the territorial ambit of the dock undertaking. If this principle is adopted it would no doubt apply to all docks and every kind of service in every dock, and the difficulty of then deciding where the dividing line between railway undertaking and dock undertaking is to be drawn is attempted to be got over by asking for a direction of this Court to the Minister of Transport to find out and report to this Court where in the case of every dock undertaking of the respective railway companies the line is to be drawn. What jurisdiction this Court has to give any direction to the Minister of Transport I do not know, and in the view I take of the appellants' contention it is immaterial to inquire. I do not agree with the construction put upon the sub-section that what the Tribunal has to do is to consider the business of the dock undertaking as one entire whole, and that it may not take into consideration the separate services which go to make up the entire business. I think that what the Tribunal is directed to take into consideration is not the business carried on by the company, but the charges in respect of any business carried on by the company. Under this direction the Tribunal are, in my opinion, entitled, and, under the last part of the sub-section, specially directed, to take into consideration the different operations which go to make up the business of a dock undertaking, for which operations separate and distinct charges are made. If this construction of the sub-section is correct it follows that the Tribunal may come to the conclusion that some of the charges are subject to and some are not subject to its jurisdiction. This conclusion of itself disposes of the appellants' main contention.

In addition to the difficulty in the appellants' way created by this construction of the sub-section, there is also the decision of the Tribunal upon a construction of the statute as a whole that the charges for collection and delivery services within the dock area are subject to their jurisdiction. This decision has not been appealed from. There is the further difficulty, which in my opinion is insuperable, and that is that having regard to the number of dock undertakings, the diversity of provisions under which they were created or are operated, the different kinds of services which may be performed within the territorial ambit of a dock undertaking, it is quite impossible to lay down any general rule which would cover every dock undertaking and every kind of service performed within the limits of the dock undertaking. It may be that when the question of revision of charges arises the Tribunal may consider that, the appointed day having passed, their jurisdiction and their powers under s. 59, sub-s. 6, are very different from what they are under s. 58, sub-s. 4, and that questions which are now material for consideration will be no longer material; but assuming this is not so, and that they still have to consider what charges are or are not within their jurisdiction, all I feel able to say is that the charges in each dock undertaking must be considered separately, that the statutory provisions regulating the undertaking must necessarily be taken into consideration, and how the charge sought to be imposed can be supported. It is impossible to frame an exhaustive list of all the matters which should be taken into consideration. Until all the facts relating to any particular service are known no one can say what it is necessary to consider in relation to that service. This decision may seem to impose a grievous burden upon the Tribunal, but it will not be greater than those they have already borne, and which they have been materially assisted in bearing by the good sense and assistance of the parties interested, which good will and assistance will no doubt be forthcoming in the future as in the past.

As the appellants have succeeded in displacing the decision of the Tribunal, the appeals will be allowed, but the only order made will be that the respondents pay the appellants' costs.

SCRUTTON L.J. This is an appeal from the Railway Tribunal established under the Railways Act, 1921. This appeal is on questions of law only; there is no appeal as to questions of fact, or as to locus standi of persons appearing before the Tribunal. Under this power of appeal the Dock and Harbours Association (which includes the Port of London Authority, the Mersey Docks and Harbour Board and the Clyde Navigation Trust, as well as numerous other Docks and Harbour Authorities) and the Manchester Ship Canal Company appeal to this Court against what they allege to be an erroneous decision in point of law of the Railway Tribunal.

The question arises in this way: The Railways Act, 1921, which amalgamated the railways of Great Britain into four groups, proposed also to regulate their income and the charges from which it was partly derived. They were by s. 58, sub-s. 1, to be given a standard revenue which was to be equal to their net revenue in 1913 with additions to represent interest on capital since expended. This standard revenue was to be derived from "standard charges" for certain matters, with the addition of "other sources of revenue." The standard charges were to be fixed by the Tribunal at such a rate as would with the other sources of revenue yield, in the opinion of the Tribunal, the standard revenue; and there was to be a yearly revision to adjust charges to revenue required. But some of the "other sources of revenue" were businesses subsidiary and ancillary to the railways, in which the Tribunal could not fix the charges, and Parliament appears to have thought that it might be that the railways, by making insufficient charges in these subsidiary businesses, might require too much revenue to be raised from standard charges. To prevent this, Parliament by s. 58, sub-s. 4, required the Tribunal, if it considered that charges of the companies in these subsidiary businesses were inadequate, but had no power directly to fix these charges at an adequate level, to attempt indirectly to make those charges adequate by only allowing so much standard revenue from "standard charges," as would be necessary if the subsidiary charges were adequate. In other words, inadequacy in subsidiary charges was if possible to be corrected by disallowing the amount of the inadequacy in estimating the revenue which should be raised from standard charges. This it was hoped would induce the railway companies to supply the amount which otherwise might be disallowed from standard charges, by raising their subsidiary charges to an adequate level. This provision certainly might protect the payer of standard charges on the railways from paying more in standard charges

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because the railways were making inadequate subsidiary charges. It also would tend to protect independent undertakings which competed with the subsidiary businesses of the railways, from competition by means of charges inadequate for the subsidiary work done, which the railways were able to keep inadequate, because they made up the loss out of standard charges on the user of railways. To carry out this object, harbour authorities appeared before the Tribunal to say that the charges in docks subsidiary to the railways, or "railway docks," were inadequate to the capital involved and work done. They were given locus standi by the Tribunal, and this decision is unappealable. Working out s. 58, sub-s. 4, the Tribunal had to "take into consideration the charges in respect of any business carried on by the company ancillary or subsidiary to its railways, the charges for which are not subject to the jurisdiction of the Tribunal." The reason for the latter provision appears to be this. The Tribunal were fixing standard charges before "the appointed day" at which those charges were to come into operation. If at that time there were any subsidiary charges they could at that time fix, in respect of such charges there was no need to attempt to correct their inadequacy by cutting down standard revenue and charges. It was only with regard to subsidiary charges which they could not at that time fix, that it was necessary to use the indirect method of correcting their inadequacy, by giving the railway companies a motive to make them adequate. This consideration in my opinion shows that the fact that after the appointed day (see s. 28, sub-s. 2, and s. 55 of the Act) the Tribunal could under s. 28, and Sch. V., para. 11, determine on application by a trader the reasonable charge he should pay, does not make such charges before the appointed day charges subject to the jurisdiction of the Tribunal and therefore excluded from consideration under s. 58, sub-s. 4, of the Act. They cannot be fixed when the consideration of standard charges is to take place.

The next question is what are the subsidiary and ancillary businesses, the charges of which the Tribunal cannot fix but are to consider. We were told that one of the few things on which the parties before us were agreed was that railway docks and harbours were businesses ancillary and subsidiary to the railways. These might be of two classes: they might be docks originally constructed by the railways, or docks originally constructed as independent undertakings under dock Act powers and then purchased or absorbed by railway companies under amalgamation Acts; and in this latter case subsequent additions might have been made to them under either dock powers or railway powers. There were over a hundred of these railway docks, differing widely in situation and statutory powers. For instance the position at the Southampton Docks was completely different from that at the Hull Docks, and the individual docks at Hull differed considerably from each other in the statutes applicable. It would seem an almost impossible task to lay down one general principle which would apply to all these various docks. The railway companies however proceeded to endeavour to do it, and persuaded the Tribunal that their attempted solution was right. It is a melancholy fact that their counsel now admit that the conclusion they persuaded the Tribunal to come to was erroneous in law.

In considering the adequacy of charges in an ancillary dock business, a line had to be drawn to indicate where the dock ended and the railway began. The eminent accountant for the railway companies, Mr. Quirey, prepared a careful statement of what was included in the "dock" which he read to the Tribunal: "Water spaces, jetties, piers, pontoons, stathes, floating and graving docks, lock entrances, bridge plant, floating craft, cranes, coal hoists and shoots, bridges across docks—provided they are not for railway purposes—paths or roads for access to the area, workshops, stores and offices solely used by the company's staff engaged in the upkeep and working of the area, and any other appliances in connection with the working of that area." This answer he shortened later as follows: "the properties and spaces dealt with as 'dock' you may take roughly as water spaces, quay walls and wharves." The latter word is of course

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ambiguous, as it depends how much of the "wharf" on the landward side you are considering. Mr. Quirey does not seem to have been aware that on many quays the goods discharged from a ship go straight into a "transit shed" at the ship's side, where they are sorted, and some taken delivery of by consignees and carted away, some taken away on trucks. He did not intend to exclude all dock warehouses from docks, and include them in railways, though the warehouses may have been part of the original dock undertaking and used largely or even entirely for goods which do not go on the railways at all. He did intend to exclude all dock railways, i.e., lines of rail in the dock undertaking, and dock bridges, if they had lines of rail on them. He apparently did exclude (though whether he knew about their existence or not does not appear) all charges made for work done on land of the dock undertaking, or storage on that land, as, for instance, charges for storing timber in the open at Hull on land belonging to the dock undertaking, charges for coopering or mending casks or packages of goods discharged on the dock land, and there dealt with, and charges for rent or transit sheds, where goods discharged from a ship remained there for more than a certain length of time. Mr. Quirey said quite truly "this is the division we are now making between dock and railway in our accounts." The Tribunal adopted this division as satisfactory in their judgment of March 30, 1926, the judgment appealed against, and apparently adopted it because they took the view that it was an existing practice at the time of the passing of the Act of 1921: "something which is already known does not require to be resettled"; and that the Act continues and utilizes a division which already exists. This view appears to rest on a complete misunderstanding of the evidence, which it was admitted by counsel for the railway companies did not justify it. It appears that after the Railway Companies (Accounts and Returns) Act, 1911, which required a separate item of revenue and expenditure on "docks, harbours and wharves," only one set of accounts had been presented by the various railway companies concerned, namely, in 1913, and the practice of the various companies in allocating revenue and expenditure to docks varied. It further appeared that it was only after the passing of the Act of 1921, when it first became of importance to the companies to limit the items included in docks, that the companies more or less agreed on the division put forward by Mr. Quirey. I say "more or less," for it was clear that the Southampton Docks were treated in a different way. A division which did not come into existence till after the Act was passed cannot possibly have been recognized and continued by the Act. But acting on their view, the Tribunal excluded from their consideration all charges relating to dock undertakings except those specified by Mr. Quirey, and did not consider whether they were adequate. Whether this exclusion was right in law, was the first question raised by the appeal.

I am of opinion that there is nothing in the Act which justifies the division stated by Mr. Quirey, and the exclusion from consideration of all charges on the landward side of it, and indeed counsel for the railway companies did not contend that there was. Docks, historically, are much older than railways. The statutes relating to the docks of London or Hull begin in the eighteenth century when railways were not thought of; and many of the present railway docks had their origin quite independently of railways, under Dock Acts. In 1847 the common clauses in dock Acts were included in the Harbours, Docks and Piers Clauses Act, which in most dock Acts since that date is incorporated in whole or in part. The scheme of the Act was that there was a dock undertaking, the harbour, dock and pier and the works connected therewith, including lands authorized to be used in connection therewith, and s. 33 of the Act of 1847 reads as follows: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers." Sect. 83 gave power to the dock company to make by-laws for the use of the harbour, dock or pier, which had to be confirmed by a judge of one of the superior

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Courts, and one of the subject-matters of by-laws was "for regulating the duties and conduct of the porters and carriers employed on the premises of the undertakers and fixing the rates to be paid to them for carrying any goods from or to the same." The scheme of dues or tolls contained in the Acts was (1.) a tonnage rate on vessels using the dock; (2.) a tonnage rate on goods using the dock undertaking. Questions, of course, arose as to the period for which these rates franked the vessel or goods, and this was dealt with by fixing, sometimes by by-law, sometimes by rate-book, a period after which "rent" began, whether the goods were stored in warehouses, transit sheds, or in the open on land of the dock undertaking. Further, the dock companies from the first performed services to the goods of which cooperage, or repairing packages, is a very good example, and from the middle of the last century it was common to find in dock Acts a kind of omnibus clause authorizing reasonable charges for all services rendered to goods, a long list of special kinds of services being enumerated. Further, for a long time no railway engines were found in docks at all. Goods were brought, or removed, by various kinds of carts, and though the dock companies laid down rails in docks, there were statutory provisions, as in the Hull Acts, that no locomotives were to be used on them; trucks were to be moved on them by horse or man power. This, however, in each dock would vary with its history, its statutory authorities, and the extent to which, if a railway company which had not constructed it, absorbed it, railway powers were given by the relevant Acts, and whether or not to the exclusion of dock powers. In fact the Act of 1921 contains in Sch. V., para. 9, a provision preserving to railway companies all their dock powers, a provision repeated from the Rates and Charges Orders made before the passing of the Act. Para. 19 of the same Schedule appears to prevent docks or shipping places, the charges for the use of which are regulated by Act of Parliament, being treated by the railway companies as "terminal stations." Para. 11, sub-s. 7, as to "dock charges" is also worthy of attention.

In view of this state of the law and facts, it appears quite impossible to extract from the Act of 1921 and the evidence, the division between railways and ancillary businesses of docks which the Tribunal have adopted, and in acting on which they have excluded from consideration charges at dock warehouses or storage spaces, though none of the goods stored in them use railways, and all charges in respect of conveyance on railways in the dock, in whatever circumstances those rails were laid, or charges were made for their use.

It follows that a point of law was wrongly decided by the Tribunal. The question is what is to be done. Counsel for the railway companies, while admitting after a time the error in law, urged that it would occasion excessive delay, without any real benefit, if the Tribunal which had now fixed a scale of standard charges was required to withdraw it and revise the whole Schedule if a protracted investigation of individual railway docks should show some charges therein were inadequate. Counsel for the Harbour Authorities were clearly afraid not so much at this prospect as of the effect on the Court of the prospect, and they said they did not want the Schedule sent back and reconsidered, but would be content with a declaration which could be used by them at the next revision of standard charges. Sir John Simon in the course of the argument before us submitted a suggested form of declaration which it is fair to the Tribunal to say he had not submitted to them. It was as follows: "That the business of docks, etc., carried on by a railway company, ancillary or subsidiary to its railways within the meaning of s. 58, sub-s. 4, of the Railways Act, 1921, includes all receipts and expenditure in respect of services rendered or accommodation afforded at or in connection with all lands, quays, railway lines, junctions, sidings, tramways, warehouses, acquired, used, constructed, installed or maintained under or by virtue of the respective Acts of Parliament authorizing the said railway company or its predecessors to construct and maintain the undertaking of the said docks, etc., or any part thereof. (2.) That the charges in respect of the said business as above defined are not within the jurisdiction of the Railway Rates Tribunal. (3.) The charges in respect of such business to be taken into consideration by the Tribunal within the meaning of s. 58, sub-s. 4, and financial results obtained from the operation of such business within the meaning of s. 59, sub-s. 6, include the charges and financial result of such business as above defined. Order with the consent of the appellants and without prejudice to their rights on any review under s. 59 of the Act, that the matters involved in this appeal be referred back to the Railway Rates Tribunal with a direction that for the purpose of the fixation of standard charges a nominal adjustment by adding 1000*l.* as further expenditure of the business of docks, etc., be made in relation to each of the four companies." This declares in effect that if accommodation has been provided under Acts authorizing the construction or maintenance of docks, all use of or services rendered in connection with such accommodation are to be taken as part of the ancillary business of docks. I suppose it involves that if a railway company stores goods which have come by rail in a warehouse on land originally acquired for a dock undertaking, though those goods are never going to be shipped at all, the rent is to fall into dock business. In my view it is quite impossible to make such a wide declaration which may affect some hundred docks, about whose statutory conditions and working history we know nothing. If the case of a particular dock comes before us, with relevant findings of fact by the Tribunal, we can deal with any questions of law decided by the Tribunal in settling the sphere of the ancillary business; but in making a general declaration affecting docks whose working conditions and statutory conditions we are ignorant of, we may easily fall into the most hopeless errors.

I agree with both sides that the Tribunal was wrong in law when, accepting the demarcation between dock and railway submitted by the companies, they declined to take into consideration any matters on the railway side of that line. I agree with both sides that although this is so, it is not desirable to reopen the whole of the present consideration of inadequacy of charge, with its possible result on the schedule of standard charges. The dock authorities, treating the matter generally, and with very slight reference to particular docks, got some such result as this. The capital invested in railway docks, they said, should have produced 700,000*l.* revenue, and did produce 300,000*l.*; amount of inadequacy, 400,000*l.*, which should be deducted from standard revenue. But the gross revenue to be raised by standard charges was about 200 million; the inadequacy was less than one-quarter per cent. of this, or less than 5*s.* in the 100*l.*, or a little over a halfpenny in the pound. If this inadequacy was spread over a hundred docks, it was minute in each, and there was no attempt to differentiate between particular docks.

It may be said that to decide nothing but that the Tribunal adopted a wrong line of demarcation in their construction of the statute, and to abstain from fixing the right line, does not help the Tribunal, and indeed the Tribunal are disposed to say that it will be impossible to work the Act, if they cannot adopt the line of demarcation in the railway accounts. I sympathize with their difficulties, but I think the answer is that Parliament has, probably without appreciating it, set them a very difficult task which cannot be performed by treating all the docks of all the companies as one ancillary business to which one rule can be applied without considering the particular facts and statutes and charges of each dock. If when in future they consider under s. 58, sub-s. 4, the adequacy of charges in ancillary businesses no one comes to allege to them that the charges are inadequate their task is easy. If such an objector does come, it seems to me he may be required in the first instance to take a particular dock with its particular circumstances and statutory history and make a case that those particular charges are inadequate, the line of dock business being drawn as to the particular circumstances of that dock. Generally, without finally committing myself, it seems to me that warehousing on a dock undertaking goods exported or imported, storing such goods in the open on dock lands, the use of transit sheds, and services such as coopering, are dock and not railway charges. Charges for conveyance on rails on dock land raise more difficult questions, and I should want to know how and under what powers the rails were laid down, and what statutes or by-laws are applicable to the rates charged, whether anything is charged for (*a*) use of the land on which the rails are laid; (*b*) use of the rails so laid; (*c*) any and what kind of terminal charges, or whether the charge is merely for haulage, also how the expenses of maintenance are provided. I gather that the railway companies agree that such an inquiry would produce quite a different result in the case for instance of Southampton from that in some other docks. The result is that the appeal against the refusal of the Tribunal by reason of their construction of the Act of 1921 to consider under s. 58, sub-s. 4, of the Act the adequacy of any charges of dock ancillary businesses other than those covered by Mr. Quirey's definition, must be allowed, because they arrived at an erroneous construction of the Act for the reasons stated in this judgment. But the Court does not give any further directions as to reconsideration of adequacy of charges of ancillary businesses, or revision of the standard charges, which on the view taken by both sides before us, is undesirable at this stage. When the next revision of charges comes, the Tribunal, if called upon to act under s. 58, sub-s. 4, will have regard to the views expressed in the judgments of the Court as to the legal position. The appeal must be allowed with costs.

ATKIN L.J. In view of the admissions made by both parties and the judgments already delivered, I find it unnecessary to give a detailed judgment of my own. I agree with the reasons given by the other members of the Court for allowing the appeal.

There is one matter, however, which I think it desirable to mention. By reason of the wrong construction adopted by the Tribunal as to the extent of the subsidiary business in question, it has been unnecessary to consider the precise meaning of the word "adequate" in "adequate charges" in s. 58, sub-s. 4. If ever it has to be considered it will probably be found to entail some consideration of the expenses of the business in respect of which the adequacy of its charges are being investigated. And, if this is so, it may be found that the problem of the delimitation of the dock undertaking will not be solved by merely ascertaining whether charges are dock or railway charges. The expenses of maintaining the dock structure on or in which railway charges are earned may be found to be dock expenses.

Appeal allowed.

Solicitors for Manchester Ship Canal Company: *Grundy, Kershaw, Samson & Co.*

Solicitors for Dock and Harbour Authorities Association: *Chamberlayne, Keene & Co.*

Solicitors for railway companies: *H. L. Thornhill; Sir R. Francis Dunnell; A. G. Hubbard; W. Bishop.*

Solicitor for Minister of Transport: *Treasury Solicitor.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Practice—Money-lender's Action—Summons for Judgment under Order XIV.*—Leave to enter Judgment for Part of Principal—Excessive Interest alleged—Harsh and unconscionable Transaction—Leave to defend—Directions for Trial—Short Cause List—Money-lenders Act,* 1900 (63 & 64 *Vict. c.* 51), *s.* 1*—Rules of Supreme Court, Order* III.*, r.* 6; *Order* XIV.*, rr.* 1, 8, 9.

Where an action is brought by a money-lender to recover a liquidated sum for principal and interest upon a writ specially indorsed under Order III., r. 6, the claim being supported by a proper affidavit, the master or judge in chambers has jurisdiction to order the action to be put into a special list for speedy trial under Order XIV., r. 8, commonly called the short cause list, notwithstanding that the sum claimed in the action consists in part of interest which is disputed on the ground that the rate of interest is excessive and that the transaction of loan is harsh and unconscionable within the meaning of the Money-lenders Act, 1900.

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This jurisdiction should however be cautiously and sparingly used, and exercised only in plain and simple cases.

Order made in this particular case for trial of the action in the short cause list after leave to the plaintiff to enter judgment for balance of the principal admitted to be still due and unpaid.

Judgment of Collins M.R. in *Wells* v. *Allott* [1904] 2 K. B. 842 explained *Bennett* v. *Stubbs* [1926] 1 K. B. 272 not followed.

APPEAL from an order of Swift J. in chambers affirming an order of Master Ball refusing to order that the action should be put into a special list and forthwith set down for trial under Order XIV., r. 8, of the Rules of the Supreme Court.

The plaintiff, a money-lender registered and trading under the name of Samuels & Co., brought an action to recover 325*l.*, balance alleged to be due on a joint and several promissory note dated July 28, 1926, made by the defendants and payable to the plaintiff by equal monthly instalments of 125*l.* each commencing on August 28, 1926. The promissory note provided that if default should be made in payment of any instalment the whole amount remaining unpaid should become due and payable immediately, the bill (sic) to carry interest at 5 per cent. per month from maturity until paid. Default was made in payment of the fourth instalment. The plaintiff also claimed interest at 60 per cent. per annum from November 28, 1926, till payment or judgment.

On January 19, 1927, the plaintiff took out a summons under Order XIV., r. 1, for leave to sign final judgment against the defendant Cooper. In his affidavit this defendant stated that he had repaid the plaintiff the sum of 425*l.*, leaving a balance of 75*l.* due in respect of principal. He contended that the transaction was harsh and unconscionable and one in which a Court of equity would grant relief, and he asked that he might have relief under the Money-lenders Act, 1900, and have the transaction reopened and be relieved from payment of any sum beyond the amount fairly due to the plaintiff for principal, interest, and charges.

On January 27, 1927, it was ordered by the master that if the defendant Cooper did not within three days pay 75*l.*

the plaintiff should be at liberty to sign judgment against him for that sum, and it was further ordered that the said defendant should be at liberty to defend the action as to the residue of the plaintiff's claim, and that there should be pleadings in the action and discovery of documents, and that the case should be tried by a judge alone in Middlesex. The master refused to order that the case should be put into a special list for speedy trial under Order XIV., r. 8, holding, on the authority of *Bennett* v. *Stubbs* (1), that this could not be done. The plaintiff appealed, and prayed in particular that the master's order might be varied so far as it gave directions for the trial, and that the action might be remitted for trial in the short cause list. Swift J. affirmed the master's order.

The plaintiff appealed.

J. B. Matthews K.C. and *R. F. Levy* for the appellant. The master and the learned judge considered themselves bound by *Bennett* v. *Stubbs* (1) to hold that they had no jurisdiction to put into the short cause list a money-lender's action although it was brought upon a writ specially indorsed under Order III., r. 6, and supported by an affidavit conforming in all respects with the requirements of Order XIV., r. 1. But first *Bennett* v. *Stubbs* (1) did not decide that. It merely decided that, where the whole principal had been paid and the only questions remaining were whether the interest was excessive and the transaction harsh and unconscionable, the short cause list was not an appropriate means of trying those questions. And in many cases it is not. If *Bennett* v. *Stubbs* (1) really purports to decide that there is no jurisdiction to put into the short cause list a case where the writ is specially indorsed and the claim is properly verified and where the principal debt or part thereof is admittedly due and owing, the decision cannot be sound, because it would in effect deprive the master and judge in chambers, and this Court also, of a jurisdiction conferred upon them by Order XIV., r. 8, which has the effect of a statute. No previous authority warrants

(1) [1926] 1 K. B. 272.

such a decision and the existing authorities are opposed to it. *Bennett* v. *Stubbs* (1) itself purports to follow *Wells* v. *Allott* (2) and particularly the judgment of Collins M.R. in that case where he says: "Where . . . . jurisdiction is given to the Court by the Money-lenders Act, 1900, to determine whether the plaintiff is entitled in the circumstances to recover what is a prima facie debt . . . . that class of case is taken out of Order XIV." But it is plain that the Master of the Rolls was referring to summary judgment under Order XIV. The appeal in that case was from an order of Phillimore J., who had given the plaintiff leave to enter final judgment under Order XIV., r. 1. The last words of the judgment of Cozens-Hardy L.J. show what the Court was really deciding. Moreover the Court restored the order of the master which gave the defendant leave to defend on condition of paying a sum and interest thereon within a specified time. That order could not have been made if the case had literally been "taken out of Order XIV." Until April 1, 1919, if a case was not within Order XIV., the master or judge in chambers had no choice but to dismiss a summons for judgment and no order could have been made upon the summons. That was the effect of Order XIV., r. 9 (*b*), before it was altered by the Rules of the Supreme Court (March), 1919. That in *Wells* v. *Allott* (3) the Court intended to decide no more than that the case was not one for summary judgment is also shown by *Lazarus* v. *Smith* (4); but that case is important for another reason, for there the Court of Appeal actually did what *Bennett* v. *Stubbs* (1) says it has no power to do; the Court made an order for the trial of the case in the short cause list in circumstances which were undistinguishable from those of this case. But the matter does not rest there. In *Rothfield* v. *Leighton* (5), a money-lender's action where the defence was that the plaintiff was not duly registered under the Act, this Court (Scrutton L.J. and Eve J.) affirmed an order of Rowlatt J. giving the

(1) [1926] 1 K. B. 272.
(2) [1904] 2 K. B. 842, 846.
(3) [1904] 2 K. B. 842.
(4) [1908] 2 K. B. 266.
(5) Unreported. Dec. 4, 1918.

defendant leave to defend and putting the case in the short cause list. In *City and County Private Finance Co.* v. *Dolphin* (1) the plaintiffs sued on a promissory note payable by monthly instalments commencing on November 10, 1919. The defendant had paid the first instalment. Before the second instalment became payable his solicitors offered to repay the amount actually advanced with interest at 25 per cent. This was refused, and then the borrower issued a writ in the Chancery Division for relief. After default in payment of the second instalment the money-lenders issued a writ in the King's Bench Division specially indorsed under Order III., r. 6, and applied for leave to enter judgment under Order XIV., r. 1. Master Chitty, after consulting the other masters, gave the plaintiffs leave to enter judgment for the unpaid principal and gave the defendant leave to defend as to the rest of the claim and ordered that the case should be put into the short cause list. This order was affirmed by Rowlatt J. and the Court of Appeal (Bankes and Scrutton L.JJ.). (2)

With regard to the other cases cited in support of *Bennett* v. *Stubbs* (3), *Dott* v. *Bonnard* (4) merely followed *Wells* v. *Allott* (5) and did not intend to decide more than was decided in that case. This is clear from the words of Mathew L.J. that it was not right for a master or judge in chambers to take upon himself the administering of the Money-lenders Act; meaning that the case was not one for summary judgment, but for trial in Court whether as a short cause or otherwise. *Tumin* v. *Levi* (6) was a question whether the case should be tried in the Chancery Division, where the debtor had issued his writ, or in the King's Bench Division where the money-lender subsequently issued his. The dicta of Buckley L.J. in that case are again based on *Wells* v. *Allott* (5) and cannot be considered binding on this Court. In *Symon & Co.* v. *Palmer's Stores* (1903), *Ld.* (7), which was not a money-lender's action, the only question was whether the affidavit in support of the claim was sufficient. There Buckley L.J., in pointing out the proper course to be taken when there was no sufficient affidavit, repeated his former dictum in *Tumin* v. *Levi*. (1) The dispute in *Bennett* v. *Stubbs* (2), until it reached this Court, had been simply whether the case should be referred to the county court or remain in the High Court. The question of the jurisdiction of the Court to put the case into the short cause list was raised for the first time by the appellant in the Court of Appeal and came as a surprise to counsel for the respondent, with the result that *Tumin* v. *Levi* (1) was cited but *Lazarus* v. *Smith* (3) was not cited to the Court. The present case is a plain and simple one in which one transaction only has to be investigated and for the trial of which therefore the short cause list is eminently suitable.

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(1) Unreported. Feb. 12, 1920.

(2) From a note of the case kindly supplied by Mr. J. B. Matthews K.C.

(3) [1926] 1 K. B. 272.

(4) (1904) 21 Times L. R. 166.

(5) [1904] 2 K. B. 842.

(6) (1911) 28 Times L. R. 125.

(7) [1912] 1 K. B. 259.

A. E. Woodgate for the respondent. This case is covered by *Bennett* v. *Stubbs*. (2) Order III., r. 6, only applies to liquidated claims. A money-lender's claim for interest, to which the Money-lenders Act, 1900, applies, though it may be in appearance, is not in reality, a liquidated claim. The money-lending transaction includes a contract to pay a sum for principal and a sum for interest. So far as the interest is concerned the claim is not liquidated, because Parliament has prohibited the lender from insisting on the stipulated sum. He recovers, not what the borrower has agreed to pay, but what the Court considers fair and reasonable, and there is no liquidation until the Court fixes the amount. Not being in substance a liquidated claim, and therefore not within Order III., r. 6, it is not within Order XIV. It is, in the words of Collins M.R., "taken out of Order XIV.": *Wells* v. *Allott*. (4) It is quite clear from that case and from *Dott* v. *Bonnard* (5), *Tumin* v. *Levi* (1), and *Symon & Co.* v. *Palmer's Stores* (1903), *Ld.* (6), which followed it, that the Court of Appeal intended that these money-lenders' cases, many of which involve not merely one or two transactions but numerous renewals and variations

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(1) 28 Times L. R. 125.
(2) [1926] 1 K. B. 272.
(3) [1908] 2 K. B. 266.
(4) [1904] 2 K. B. 842, 846, 848.
(5) 21 Times L. R. 166.
(6) [1912] 1 K. B. 259.

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of previous transactions through several years, should be dealt with at length and with full care and attention and should not be treated as short causes and still less subject to summary procedure. In *Lazarus* v. *Smith* (1) the appeal was from the order giving leave to enter judgment for the sum admittedly due. The jurisdiction of the Court to put the claim for interest into the short cause list was not in issue. Nor was this question discussed or considered in either *Rothfield* v. *Leighton* (2) or *City and County Private Finance Co.* v. *Dolphin* (3), and *Bennett* v. *Stubbs* (4) remains an authoritative decision of this Court which ought to be followed.

Counsel for the appellant were not called on in reply.

BANKES L.J. This appeal raises an important question of practice—namely, whether there is any decision of this Court which prevents a master or a judge from ordering a claim for interest in a money-lender's action to be tried in the short cause list where the claim is disputed on the ground that the interest is excessive and the bargain harsh and unconscionable. It is well to bear in mind that the effect of such a decision would be to deprive the plaintiff of a benefit conferred upon him by statute. To make this plain I must refer to some of the Rules of the Supreme Court. First there is Order III., r. 6 which provides that where a case comes within its terms and if the writ is specially indorsed and the plaintiff has followed the directions contained in Order XIV., r. 1, by making a sufficient affidavit, the plaintiff has a statutory right to apply under that Order and Rule for liberty to enter final judgment for the amount indorsed on the writ together with interest, if any; and secondly, the plaintiff having that right and having exercised it, the Rules confer upon a master or judge as the case may be a statutory jurisdiction to deal with the application in certain specified ways. He may in a proper case give leave to enter judgment for the full amount of the claim; or in a proper case he may give leave to enter judgment for part of the claim and give the defendant leave to defend as to another part of it. Then by Order XIV., r. 4: "If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the judge may think fit." Therefore if there is no defence to part of the claim the Rule directs that the plaintiff shall have judgment for that part. "And the defendant may be allowed to defend as to the residue of the plaintiff's claim." Then by r. 8 (*a*) where leave, whether conditional or unconditional, is given to defend, the judge is empowered to give all such directions as to the further conduct of the action as may be given on a summons for directions under Order XXX., and by r. 8 (*b*) the judge may, if he thinks it advisable, order the action to be put in a special list of cases in which a prolonged trial will not be requisite, commonly known as the short cause list. Finally, by r. 9 (*b*), "If the plaintiff makes an application under this Order where the case is not within the Order, or where the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs to be paid forthwith by the plaintiff."

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(1) [1908] 2 K. B. 266.
(2) Unreported.
(3) Unreported.
(4) [1926] 1 K. B. 272.

Those Rules give the judge or master a statutory jurisdiction. To contend therefore that a judge or master has no jurisdiction to order the contested part of a claim, albeit it is a money-lender's claim and the contested part consists of interest, to be put into the short cause list, is to say that something has happened to deprive the judge or the master of that jurisdiction.

The only possible argument in favour of this contention —I do not in the least agree with it—is the one advanced by counsel for the defendant in *Wells* v. *Allott* (1), that the

(1) [1904] 2 K. B. 842.

effect of the Money-lenders Act, 1900, was to oust the jurisdiction to deal with the case under Order XIV. The only way in which the Act could have that effect would be by transforming a money-lender's claim upon a bill of exchange or promissory note from a debt or liquidated demand into an unliquidated demand. That was in substance the argument for the defendant in *Wells* v. *Allott*. (1) It was not accepted and in my opinion it is an impossible contention.

Then is there any decision of the Court which binds us to say that the judge or master has been deprived of that jurisdiction to put the case into the short cause list. It is said that *Bennett* v. *Stubbs* (2) has that effect. We must therefore consider that decision and, if it is found to be in conflict with other decisions of this Court, we must see which we ought to accept as law. Now the judgment of the Master of the Rolls in *Bennett* v. *Stubbs* (2) is based upon his reading of the judgment of Collins M.R. in *Wells* v. *Allott*. (1) It seems to me, speaking with all respect, that the words of Collins M.R. have been interpreted without reference to the facts in connection with which they were spoken. *Wells* v. *Allott* (1) was a money-lender's action. It was brought on a specially indorsed writ claiming a principal sum and interest due on a promissory note. The defendant in his affidavit under Order XIV. admitted that portion of the principal sum was still due, but he contested the claim for interest on the ground that the rate of interest was excessive, harsh, and unconscionable. The master gave the plaintiff leave to enter judgment for the amount of principal which the defendant admitted to be due, and for a certain amount of interest. For the rest of the interest he gave the defendant leave to defend. On appeal to the judge the plaintiff swore an affidavit to show that the transaction was not harsh or unconscionable, and Phillimore J. discharged the order of the master and gave the plaintiff leave to enter judgment for the full amount claimed. The question before the Court of Appeal was whether that was a right order. The Court reversed the order of Phillimore J. and restored the order

(1) [1904] 2 K. B. 842.
(2) [1926] 1 K. B. 272.

of the master, which, as I have said, gave the plaintiff leave to enter final judgment for the principal in arrear and admittedly unpaid. Those were the circumstances in which Collins M.R. used the words which form the foundation of the judgment in *Bennett* v. *Stubbs*. (1) Those words are (2): "It is clear in the present case that there is prima facie a debt due from the defendant to the plaintiff. The defendant has, however, made an affidavit which, if true, may establish a defence under the Money-lenders Act, 1900, to the greater part of the claim. The procedure under Order XIV. is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence. But where in a particular class of case a special jurisdiction is given to the Court by the Money-lenders Act, 1900, to determine whether the plaintiff is entitled in the circumstances to recover what is a prima facie debt"—obviously referring to the claim for interest—"it seems to me to be clear that that class of case is taken out of Order XIV." It is seldom that the language of so accurate a judge as Collins M.R. is open to criticism, but when he speaks here of the class of cases being "taken out of Order XIV." those words cannot be taken literally, because with the same breath he was allowing judgment under Order XIV. for part of the claim. Yet in *Bennett* v. *Stubbs* (1) Pollock M.R. took those words as meaning that when the Money-lenders Act, 1900, is pleaded to an action for a liquidated demand brought by a writ specially indorsed under Order III., r. 6, and supported by a proper affidavit, there is no jurisdiction in the Court to deal with the case under Order XIV. I do not think that meaning, which Mr. Woodgate has pressed upon us, is to be attributed to the words of Collins M.R. Mr. Matthews has sought to draw a distinction between *Bennett* v. *Stubbs* (1) on the one hand and *Wells* v. *Allott* (3) and other cases to which I am about to refer, on the other, and to suggest that *Bennett* v. *Stubbs* (1) may stand upon the distinction that in that case the defendant did not in his affidavit admit that any

(1) [1926] 1 K. B. 272.
(2) [1904] 2 K. B. 846.
(3) [1904] 2 K. B. 842.

part of the claim was due. But in my opinion that is not a real distinction, for if a judge has jurisdiction to deal with an action because it is commenced by a specially indorsed writ it cannot make any difference that, when the claim is found to consist of principal and interest, the defendant has to admit that some part of the principal still remains unpaid.

It is hardly necessary to refer to *Dott* v. *Bonnard* (1) or *Tumin* v. *Levi* (2), for neither of those cases throws any light on the matter we have to decide. In the first the defendant stated in his affidavit that he had paid more than the whole of the plaintiff's claim for principal and interest. The question was whether any order should be made under Order XIV. Of course in the face of that affidavit no order for judgment could be made. The other case was a struggle between the parties for choice of the battlefield. The borrower brought an action in the Chancery Division to set aside a money-lending transaction as being harsh and unconscionable. Afterwards the money-lender issued a specially indorsed writ in the King's Bench Division and took out a summons under Order XIV. The real question was what was the right procedure. There was indeed some difference of opinion between Kennedy L.J. and the other members of the Court, who were inclined to think that the action could not be satisfactorily dealt with as a short cause; but nothing was said which in my view bears directly upon the question we have to consider.

There are, however, three other cases, all decisions of this Court, which are very material. The question is whether we should accept those decisions in preference to the decision in *Bennett* v. *Stubbs* (3), if it goes as far as Mr. Woodgate says it does. The first of these cases is *Lazarus* v. *Smith*. (4) There a money-lender brought an action by a specially indorsed writ. The defendant pleaded the Money-lenders Act, 1900. The master gave leave to the plaintiff to enter final judgment for 40*l*. admittedly due from the defendant in respect of the principal sum advanced, and gave the defendant leave to defend the rest of the claim and ordered the case to be put in the short cause list. This order was confirmed by Ridley J. in chambers. On an appeal to this Court counsel for the defendant contended that where in a money-lender's action the defendant sets up a defence under the Money-lenders Act, 1900, Order XIV. has no application, and he cited *Wells* v. *Allott.* (1) Upon that Cozens-Hardy M.R., who had been a party to the decision in *Wells* v. *Allott* (1), said (2): "I have no desire or intention to depart from one word that I uttered in *Wells* v. *Allott* (1), and in what I then said I was merely following and adopting the language of the then Master of the Rolls. I desire to make it quite clear that my view is that in any case in which an issue has to be decided under the Money-lenders Act that is a matter which ought to be dealt with at the trial of the action, and not by summary judgment under Order XIV." So the contrast is between the trial of an action and summary judgment, not between one list of cases and another, and Cozens-Hardy M.R. is saying no more than that, where the defendant raises an issue under the Money-lenders Act, that is not prima facie a case where the plaintiff should have leave to enter final judgment on a summons under Order XIV., but that the case must be regarded as one where the defendant has shown a prima facie right to defend entitling him to have his case tried; but there is nothing expressed or implied concerning the tribunal that shall try it or the directions that may or should be given as to the mode of trial, and nothing to suggest that a simple case may not be tried as a short cause. Kennedy L.J. uses language to the same effect; he says (3): "It seems to me that, while it is our duty to maintain in all proceedings in which the Money-lenders Act comes into operation everything necessary to make the Act effective, it would be going beyond anything which that Act either demands or authorizes to say that Order XIV. does not apply to an admitted debt—a debt which is admitted

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(1) 21 Times L. R. 166.
(2) 28 Times L. R. 125.
(3) [1926] 1 K. B. 272.
(4) [1908] 2 K. B. 266.

(1) [1904] 2 K. B. 842.
(2) [1908] 2 K. B. 266, 268.
(3) [1908] 2 K. B. 269.

quite irrespective of any matter with which that Act has to deal. Here the defendant is in a position in which he must admit that, even if this loan had been given without any terms as to interest, it has not been repaid to the extent of 40*l.* It cannot be right, if Order XIV. is to be used at all, to hold that, where there is an admitted debt as to part of the claim, r. 4 is not to apply, whether it is a money-lender's claim or the claim of any other creditor. The Money-lenders Act only relates to transactions which can be reopened and modified under its provisions, and what would be reopened and modified under those provisions is not the amount of an admitted debt apart from all questions of bonus or interest, or of bonus or interest consolidated with principal." In the result the order of the master affirmed by the judge ordering the claim for interest to be put in the short cause list was affirmed by the Court of Appeal; and there must have been present to the minds of the Lords Justices not only the consideration of the short cause list as a convenient means of disposing of the case, but also the question of their jurisdiction to hear the appeal from the judge in chambers and affirm his decision, which they could not have done if the case was literally taken out of Order XIV.

That case seems to be a clear authority that the contention for the respondent is ill founded. Moreover that case is supported by two unreported decisions cited by Mr. Matthews, *City and County Private Finance Co.* v. *Dolphin* (1), where I and my brother Scrutton made or affirmed an order directing that a case should be tried as a short cause, and *Rothfield* v. *Leighton* (2), where Scrutton L.J. and Eve J. sitting as a Court of Appeal on interlocutory orders made a similar order.

Now if *Bennett* v. *Stubbs* (3) is to be taken as deciding that there is no jurisdiction either in the master or the judge to make an order for the trial in the short cause list of a money-lender's claim for disputed interest, with all respect to the Court which gave that decision it seems to me to be in conflict with the three other decisions of this Court to which I have referred and which I personally prefer, because I can see nothing to deprive the master or the judge of the jurisdiction conferred upon them by the Rules of the Supreme Court, where the case has been properly brought before them upon a specially indorsed writ supported by an affidavit in the proper form; and in my opinion in this case and in all others where a money-lender properly indorses a writ for a liquidated amount represented by a promissory note or a bill of exchange, and files a proper affidavit as prescribed by Order XIV., r. 1 (*a*), and where the defendant in his affidavit raises a defence under the Money-lenders Act, the judge and master still retain the full jurisdiction under Order XIV. to order the case, in so far as the claim is disputed, to be put in the special list for trial as a short cause; but I desire to say this also emphatically, that this jurisdiction ought to be exercised very sparingly and only in clear and simple cases. Where a defendant is seeking to reopen not only the particular transaction in question in the action, but previous transactions as well, I think as at present advised that such a case should not be sent for trial as a short cause. Probably it is true to say that in the majority of cases a master or judge would exercise a wise discretion by not sending disputes under the Money-lenders Act for trial in the short cause list, except where it is reasonably plain that the dispute is a short one. But in every case the master or judge has a discretion, and it is for him to exercise it. In the present case, as there is nothing to suggest that the question is other than a short and simple one, we ought, treating it as an exceptional one, to order the claim to be put into the special list for trial as a short cause. The appeal will therefore be allowed.

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(1) Unreported.

(2) Unreported.

(3) [1926] 1 K. B. 272.

SCRUTTON L.J. In this case the plaintiff, a money-lender, sues on a promissory note, giving credit for certain instalments paid. The defendant admits that the promissory note is for money lent but says that he has paid the principal all but 75*l.*, which is owing. As to the interest he says it is at the rate of at least 100 per cent., and he contends that this is excessive and that the transaction is harsh and unconscionable. Thereupon the master made an order giving the plaintiff leave to enter judgment for the 75*l.* unpaid and giving the defendant leave to defend the claim for interest. He was then asked to put the case into the short cause list. He took the view that the decision of two members of the Court of Appeal in *Bennett* v. *Stubbs* (1) prevented him from doing this because the claim related to the amount of interest. On appeal the judge in chambers took the same view. We have asked the learned judge whether he exercised any discretion in the matter, and he tells us that he did not, because he considered himself bound by *Bennett* v. *Stubbs.* (1) Now from what we have heard from Mr. Levy, who was counsel for the respondent in *Bennett* v. *Stubbs* (1), it appears that the point that there was no jurisdiction to put the case into the short cause list was not raised before the master or the judge in that case, but appeared for the first time in the Court of Appeal, and that consequently other cases in the Court of Appeal bearing upon the point were not cited to the Court which decided *Bennett* v. *Stubbs* (1), and particularly *Lazarus* v. *Smith* (2), a case which it is very difficult to reconcile with *Bennett* v. *Stubbs.* (1) Two unreported cases were also cited to us, both wrongly decided in the Court of Appeal if *Bennett* v. *Stubbs* (1) is right. It is not as if the Court in the later case had considered and interpreted the earlier ones. The position is that the later decision was pronounced when the judges were unaware of the previous cases, and that this Court has now before it inconsistent decisions of the Court of Appeal. In these circumstances judicial comity does not prevent us from considering all the decisions and forming our own view as to which we should follow in this case. It is no doubt possible to draw between *Bennett* v. *Stubbs* (1) and this case the distinction that there all the principal sum had been repaid, while in this case there appears to be a balance still unpaid, but on principle I cannot see that this fact makes any legal difference.

Now the Rules of Court, which have statutory authority,

(1) [1926] 1 K. B. 272.

(2) [1908] 2 K. B. 266.

give power to masters and judges in certain cases specified in Order III., r. 6, to give a plaintiff leave to enter judgment without going through the process of a trial in Court. There are conditions precedent to this jurisdiction. If anything not permitted by Order III., r. 6, appears upon the writ the statutory conditions are not fulfilled and the plaintiff cannot have leave to enter judgment unless he clears his writ of the extraneous matter. In money-lenders' actions where the plaintiff sues on a promissory note or a bill of exchange the writ generally complies exactly with the requirements of Order III., r. 6; and unless the defendant raises some defence which entitles him to defend the action, the summary process of Order XIV. may be put in force. Judgment can be given if the defendant does not appear. But generally in money-lenders' cases the defendant does appear and files an affidavit in which he does not deny that he signed the promissory note or bill of exchange, but states that it was for money lent and interest; that the interest is excessive, and that the transaction of loan is harsh and unconscionable. He thus raises a prima facie defence to a writ which has complied with the requirements of Order III., r. 6. I suppose the master or judge, if on reading the defendant's affidavit he found no evidence that the interest is excessive, might, notwithstanding the affidavit, give the plaintiff leave to enter judgment; for example, if it appeared from the affidavit that the plaintiff being hard pressed at the time had borrowed from the defendant 100*l.* at 1 per cent. interest, I should think the master or the judge might say there was no reasonable ground for thinking that the interest was excessive or the transaction harsh or unconscionable. But if the affidavit raises any reasonable doubt then it is not for the master or the judge to decide the question summarily. If the defendant admits that part of the principal sum is unpaid, the plaintiff may have leave to enter judgment for the unpaid part. The master or judge is then in this position. There is a writ properly indorsed under Order III., r. 6; the defendant shows no defence to part of the claim, he shows a possible defence to the other part; then for the undefended part his opponent gets leave to enter judgment under Order XIV., r. 1; the defended part is dealt with thus: under r. 4 of Order XIV. the defendant gets leave to defend; under r. 8 (*a*) directions are given for the further conduct of the action, and under r. 8 (*b*) the action may in a proper case be put into the short cause list. That is how the matter would seem to stand on principle, if there were no decisions upon it.

When we come to the decided cases we find that the practice has varied from time to time. In *Wells* v. *Allott* (1) the Court allowed summary judgment to stand for interest at 5 per cent. on the principal debt. This was held to be wrong in *Lazarus* v. *Smith*. (2) In *Wells* v. *Allott* (1) part of the principal being unpaid the master had given the plaintiff leave to enter judgment for that part with interest at 5 per cent. and had given the defendant leave to defend as to the rest of the interest claimed. Phillimore J. took the view that he could decide in chambers upon the affidavits the question whether the transaction was or was not harsh and unconscionable; he decided that it was not harsh or unconscionable, and gave leave to enter judgment for the whole amount claimed. The substantial point raised in *Wells* v. *Allott* (1) was whether the judge in chambers could so decide. The Court of Appeal held that he could not, and they set aside the order of the learned judge and restored that of the master. The Court consisted of Collins M.R. and Cozens-Hardy L.J. There is a passage in the judgment of Collins M.R. which has led to some misunderstanding of the effect of *Wells* v. *Allott*. (1) It is as follows (3): "It is impossible now to say that the procedure of Order XIV. can be made applicable to an action by a money-lender to recover interest on money lent, where the loan appears prima facie to carry an excessive rate of interest." That has been read, and I think it was read in *Bennett* v. *Stubbs* (4), as if it meant that no part of the procedure of Order XIV. was applicable in such circumstances. In my opinion Collins M.R. meant no more than that the summary procedure was not applicable. That was all the

(1) [1904] 2 K. B. 842.
(2) [1908] 2 K. B. 266.
(3) [1904] 2 K. B. 846.
(4) [1926] 1 K. B. 272.

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Court was concerned with. They were considering whether Phillimore J. could give leave to enter judgment for principal and interest where the affidavits raised the question whether the rate of interest was excessive, leave having been given to enter judgment for the balance of the principal due. This view is confirmed by the judgment of Cozens-Hardy M.R. in *Lazarus* v. *Smith* (1), and the more so when it is remembered that in *Wells* v. *Allott* (2) leave was given to the plaintiff to enter judgment not only for the unpaid principal but also for interest on the principal at 5 per cent. In *Lazarus* v. *Smith* (1) leave was given to enter judgment for the unpaid principal, but it was held that judgment should not have been allowed for interest even at 5 per cent.; nevertheless the case was ordered to be put in the short cause list.

In *Tumin* v. *Levi* (3) there were two actions; the first was brought in the Chancery Division by the borrower, who claimed to reopen the whole transaction; the second was brought by means of a specially indorsed writ in the King's Bench Division by the money-lender, who sought to avail himself of the procedure of Order XIV. The majority of the Court acted on the general rule that the party who first issues his writ shall be allowed to proceed; but Buckley L.J. did say, and he afterwards repeated it obiter in *Symon & Co.* v. *Palmer's Stores* (1903) (4), that in his opinion questions of interest in money-lenders' actions were never intended to be tried as short causes. Two unreported cases cited by Mr. Matthews also came before the Court of Appeal, consisting of two judges. I happened in each case to be a member of the Court. Bankes L.J. was the other member in one case and Eve J. in the other. Both cases were money-lenders' claims. In each case the question of interest was put into the short cause list for trial. In the second case, so far as I remember, the question was argued as one of discretion, not of jurisdiction. In this state of the authorities *Bennett* v. *Stubbs* (5) came before two other judges of the Court of Appeal. Mr. Levy, who

(1) [1908] 2 K. B. 266.
(2) [1904] 2 K. B. 842.
(3) 28 Times L. R. 125.
(4) [1912] 1 K. B. 259, 266.
(5) [1926] 1 K. B. 272.

was counsel for the respondent in that case, tells us that, as the point of jurisdiction was raised for the first time in the Court of Appeal, he was not prepared with all the authorities, and neither *Lazarus* v. *Smith* (1) nor either of the unreported cases was cited to the Court; and so the members of the Court were unaware that in three former cases that which was said to be impossible had already been done. Having considered all the authorities in the Court of Appeal I have come to the conclusion that the view taken in *Lazarus* v. *Smith* (1) and the two unreported cases is right —namely, that where there is a writ properly indorsed under Order III., r. 6, with a liquidated claim, but the defendant raises a prima facie defence that the interest claimed is excessive, when the master or judge gives leave to defend as to the interest, the powers of giving directions under Order XIV., r. 8 (*a*), and of putting the case into the short cause list under r. 8 (*b*) apply, although in the circumstances leave to enter judgment for the amount of interest cannot be given.

Then comes the question whether, there being jurisdiction to order that this case be put into the short cause list, the Court should make the order. I quite agree that the jurisdiction should be exercised with considerable caution. It is certainly not to be taken as a rule that where the only dispute is about the reasonableness of the interest the case should go into the short cause list. Money-lenders' cases are complicated, especially when the defendant seeks to reopen a previous transaction, and I think the masters would generally be safe in declining to put any case in the short cause list where the defendant seeks to do this. But I do not wish to lay down a rule. Where only one transaction appears to be concerned the masters must use their judgment upon the probable length of the case, and I think they might require the defendant to show that it is not likely to be a short cause. What is the financial position of the borrower at the time of the loan, and how much the money-lender knew about it, and what is the amount actually borrowed are sometimes quite simple questions, and there are

(1) [1908] 2 K. B. 266.

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undoubtedly some cases proper to be dealt with in the short cause list, but I think the masters would be wise to incline against rather than towards the short cause list for the trial of money-lenders' actions. There is no reason why money-lenders' cases in which heavy interest is claimed should have precedence of more modest demands. A case should not be put into that list unless the master has good reason to believe that it will be short. Perhaps that is the simplest and best rule that can be laid down.

ATKIN L.J. But for *Bennett* v. *Stubbs* (1) I should have found this a reasonably simple question. But that case raises a difficulty. If it had stood alone it would have governed this case, and it is a decision of the Court of Appeal that where a money-lender sues on a bill of exchange and a reasonable defence under the Money-lenders Act is raised, the Court has no jurisdiction under Order XIV. to allow the case to be put in the short cause list. It is true that the only matter in dispute was how much interest should be paid in addition to the principal debt, which had already been paid; but I can see no material difference between that case and the present, where part of the principal is admittedly still due and unpaid. But *Bennett* v. *Stubbs* (1) does not stand alone. There were at least three previous decisions of the Court of Appeal which are inconsistent with *Bennett* v. *Stubbs* (1) and in each of which the Court held and acted on the opinion that there was jurisdiction to order the trial of a money-lender's action in the short cause list where the defendant had raised a prima facie defence that the interest claimed was excessive; and none of those three cases were cited to the Court in *Bennett* v. *Stubbs*. (1) It is not therefore an authoritative decision of the Court of Appeal distinguishing the three previous cases.

This being the state of the authorities this Court is not bound by the decision in *Bennett* v. *Stubbs* (1); neither in my view need we hold ourselves bound by the previous decisions. I think it is now open to us to decide the matter on principle, and that is how I propose to deal with it.

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(1) [1926] 1 K. B. 272.

To bring the provisions of Order XIV. into operation it is necessary first that there should be a writ specially indorsed under Order III., r. 6, and secondly a sufficient affidavit following Order XIV., r. 1. Then the case is within Order XIV., and the plaintiff may apply for liberty to enter final judgment. Moreover where a money-lender sues upon a bill of exchange, including in that term a promissory note or a cheque, and claims an amount for interest which is either due as part of an agreed sum mentioned in the bill or as interest at a stipulated rate, then the amount is a liquidated claim so far as the interest is concerned by reason of the Bills of Exchange Act, 1882. It is true that the party liable on such a bill, being part of a money-lending transaction, may under the Money-lenders Act raise a defence—namely, that the interest is excessive and the transaction harsh and unconscionable. If he makes a prima facie case to that effect he is in the same position as any other defendant against whom a summons is taken out under Order XIV.; he has raised a prima facie defence which must be tried. Then the master or judge is equipped with all the powers conferred by Order XIV. He may give leave to defend either conditionally or unconditionally; he may also give directions concerning the mode of trial, including a direction, if he thinks the case is a simple one, that the action shall be tried in the short cause list. The defence that the interest is excessive and the transaction harsh and unconscionable is one which by the plain words of Order XIV., r. 1, and upon authority if that were needed, cannot be determined summarily by the master or a judge. It is a matter for trial; it still remains an issue. The money-lender may yet prove that the interest is not excessive and that the transaction is not harsh or unconscionable, in which case his bill entitles him to judgment for the liquidated sum. But while there remains an undecided issue whether the interest is excessive and the transaction harsh and unconscionable it is surely illogical to beg the question against the plaintiff and so conclude that the claim is not a liquidated claim.

Thus the matter stands apart from authority. The decision to the contrary in *Bennett* v. *Stubbs* (1) rests upon a misunderstanding induced by a common and compendious but not very precise or accurate expression that a case "is not a case within Order XIV." when what is meant is that it is not a case where the Court ought to give leave to enter final judgment on an application made by summons under Order XIV. Without referring to the whole judgment of Collins M.R. in *Wells* v. *Allott* (2), I think it is plain from two passages what he meant when he used the phrase that the case was "taken out of Order XIV." He said (3): "The question we have to determine is whether the plaintiff is entitled to judgment for the whole amount claimed under Order XIV."; and then, in the next sentence, "It seems to me that, whatever may have been the law before the passing of the Money-lenders Act, 1900, it is impossible now to say that the procedure of Order XIV. can be made applicable to an action by a money-lender to recover interest on money lent, where the loan appears prima facie to carry an excessive rate of interest." I think that means that it is impossible to say that the plaintiff is entitled to judgment under Order XIV. where the loan appears prima facie to carry an excessive rate of interest. He goes on to say: "In such a case the money-lender has not an absolute right to recover what the borrower has agreed to pay, but only a right sub modo involving an investigation by the proper tribunal for the purpose of seeing if the plaintiff's prima facie right of action is one to which in the particular circumstances effect ought to be given." Then, "The procedure under Order XIV. is meant to give a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence." The "short and speedy remedy" is of course summary judgment. Therefore it is obvious that when Collins M.R. says that "the procedure of Order XIV." cannot "be made applicable," he is referring to the procedure of a short and speedy remedy for the recovery of debts which are either admitted to be due or as to which there is no defence;

(1) [1926] 1 K. B. 272.

(2) [1904] 2 K. B. 842.

(3) [1904] 2 K. B. 846.

in other words to summary judgment. *Bennett* v. *Stubbs* (1) is therefore the only case which lays down that, where a defendant, sued by a money-lender on a bill of exchange given in respect of a money-lending transaction, makes a prima facie defence under the Money-lenders Act, there is no power to give directions under the provisions of Order XIV., including an order that the case shall be put in the short cause list.

The only other question is how the discretion ought to be exercised in this particular case. I should like to express my agreement with what has been said about the propriety of putting into the short cause list these money-lenders' cases where a prima facie defence is raised under the Act. Clearly there ought to be no general rule, if there ever was one, that all cases of that kind should be put in the short cause list. Prima facie the investigation necessary to do justice between the parties is not likely to be properly conducted within the time beyond which a short cause should not be prolonged, and although there may be cases so short and simple that they may be heard within that time, there are many more in which the fullest investigation is necessary, and the master should bear in mind that time should be allowed to both parties to pursue it.

There is one other point to which I wish to refer. Nothing that we have said applies to a case where the claim indorsed on the writ is obviously one which does not fall within Order III., r. 6. In such a case it seems doubtful whether the Court has power to make any order other than an order for unconditional leave to defend. The doubt arises from *Symon & Co.* v. *Palmer's Stores* (1903), *Ld.* (2), where it was held that in such a case the only order that can be made is to dismiss the summons. But since that case the wording of Order XIV., r. 9 (*b*), has been altered, and now instead of providing that the application shall be dismissed r. 9 (*b*) says that it may be dismissed; and so it appears that the Court has power over the summons although the decision of the Court of Appeal under the old rule is to the contrary.

(1) [1926] 1 K. B. 272.

(2) [1912] 1 K. B. 259.

But there is another provision in r. 9 (*b*) to the effect that when a plaintiff makes an application for judgment knowing that the defendant relies on a defence which would entitle him to unconditional leave to defend, in this case also the application may be dismissed. There is a dictum of Buckley L.J. in *Symon & Co.* v. *Palmer's Stores* (1903), *Ld.* (1), with which I agree, that if a plaintiff should make use of the provisions of Order XIV. in a case where he ought to have known he could not have summary judgment, and did this in order to obtain an order for trial in the short cause list, this would be an illegitimate use of the procedure; and the master or judge in exercising their discretion upon the mode of trial may consider whether the summons for judgment was justified, and if they think it was not may refuse to put the case into the short cause list.

I have only to add that this particular case seems to be an exceptionally simple one and that there is no reason why it should not be heard in the short cause list. The appeal should therefore be allowed and the case should go back to the master on a further application for directions.

Appeal allowed.

Solicitors for appellant: *Lazarus & Son.*
Solicitor for respondent: *F. W. Perkins.*

(1) [1912] 1 K. B. 259, 266.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1927
Feb. 27, 28.

THE KING *v.* GRAIN.

Ex parte WANDSWORTH GUARDIANS.

Local Government—Registrar of Births and Deaths—Superannuation Allowance—Gratuities—Sanction of Minister of Health—Emoluments—District Auditor—Disallowance and Surcharge—Poor Law Amendment Act, 1844 (7 *&* 8 *Vict. c.* 101), *s.* 32—*Poor Law Audit Act,* 1848 (11 *&* 12 *Vict. c.* 91), *s.* 4—*Local Authorities* (*Expenses*) *Act,* 1887 (50 *&* 51 *Vict. c.* 72), *s.* 3—*Poor Law Officers' Superannuation Act,* 1896 (59 *&* 60 *Vict. c.* 50), *ss.* 3, 19—*Accounts and Audit Order of January* 14, 1867, *art.* 41.

The guardians of a poor law union, in calculating the superannuation allowance to a registrar of births and deaths, took into account certain gratuities paid by them to him as being "emoluments" within the meaning of s. 19 of the Poor Law Officers' Superannuation Act, 1896. These gratuities had been paid on the suggestion and with the approval of the Minister of Health, as the successor of the Local Government Board, made and given under powers conferred by s. 4 of the Poor Law Audit Act, 1848, and s. 3 of the Local Authorities (Expenses) Act, 1887. The district auditor disallowed a portion of the superannuation allowance based on these gratuities, and surcharged it, on the ground that the gratuities were illegal and that the sanction of the Minister of Health could not legalize them :—

Held, that the district auditor was prohibited by the Local Authorities (Expenses) Act, 1887, from disallowing the payment of the gratuities, and that being so prohibited he could not disallow or surcharge so much of the superannuation allowance as was based upon them.

Decision of the Divisional Court [1927] 1 K. B. 540 affirmed on this point alone.

APPEAL of H. W. Grain, the district auditor of the accounts of the guardians of the Wandsworth Union, from an order of a Divisional Court (1) making absolute a rule for a certiorari to quash certain orders of the auditor for disallowance and surcharge in the following circumstances.

Upon the audit of the accounts of the Wandsworth Guardians (called herein "the guardians"), for the half-year ended September 30, 1925, the district auditor, H. W. Grain (called herein "the auditor"), disallowed the sum of 27*l.* 17*s.* 1*d.*, being part of a sum of 137*l.* 1*s.* 10*d.* which had been paid in respect of one half-yearly payment of a superannuation allowance awarded to A. W. Minter,

(1) [1927] 1 K. B. 540.

formerly registrar of births and deaths for a district situated in the Wandsworth Union (called herein "the registrar"). He also surcharged with the said sum of 27*l.* 17*s.* 1*d.* certain of the guardians and ex-guardians of the union who had voted in favour of its payment or had not opposed it. In the certificate of surcharge the auditor stated that the said sum represented the difference between a superannuation allowance calculated under s. 3 of the Poor Law Officers' Superannuation Act, 1896 (59 & 60 Vict. c. 50), on the registrar's average yearly income during the five years immediately preceding his resignation, and the superannuation allowance actually made to him, which had been calculated on the above average plus the average of certain gratuities paid to him by the guardians in the circumstances set out below. The auditor contended that the amount of these gratuities should not be included in the calculation. The gratuities had been paid in the following circumstances. The Local Government Board had issued a circular dated May 2, 1918, addressed to the guardians, suggesting certain payments to registrars of births and deaths. This was not acted on by the guardians. Subsequently, by s. 3, sub-s. 1 (*a*), of the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), all the powers and duties of the Local Government Board were transferred to the Minister of Health. The Minister by circular 91 dated May 14, 1920, addressed to the guardians, after referring to the above circular of May 2, 1918, suggested that gratuities to registrars of births and deaths calculated on certain principles might properly be awarded, and stated that such gratuities would be sanctioned by the Minister. The circular by clause 3 stated that the Minister "feels it his duty to remind the guardians that it is important that the case of registrars of births and deaths should be met; and he hopes that guardians will deal with these cases not less adequately than with officers eligible for war bonus." Accordingly the guardians granted the above gratuities to the registrar during the last two years of his office to meet both the increased cost of living and a decline in the amount of statutory fees received by him in respect of the duties of his office. The payment of the gratuities had been passed by the auditor at all the audits during the period in question by reason of the provisions of s. 3 of the Local Authorities (Expenses) Act, 1887, which enacts that expenses of a local authority sanctioned by the Local Government Board shall not be disallowed. The registrar had duly paid contributions to the superannuation fund in compliance with ss. 12 and 13 of the Poor Law Officers' Superannuation Act, 1896, the amount of the contributions being based not only on his statutory earnings but also on the amount of the gratuities as being "emoluments" within the meaning of that Act.

The auditor held that there was no legal authority for the payment of the gratuities, and that the sanction of the Ministry of Health did not legalize the payment, though it prevented him from disallowing it. Consequently he held that the gratuities were not "emoluments" within the definition in s. 19 of the Poor Law Officers' Superannuation Act, 1896, and therefore could not form the basis of the calculation of the superannuation allowance. He therefore disallowed the above sum of 21*l.* 17*s.* 1*d.*, the portion of the allowance based on the gratuities, and surcharged it.

The Divisional Court (Lord Hewart C.J., Avory and Salter JJ.) made the rule absolute.

The auditor appealed.

Montgomery K.C. and *Croom-Johnson* for the appellant. The Divisional Court made the rule absolute on the grounds, first, that the payment of the gratuities was legal; secondly, that the payments might therefore be, and that they were, "emoluments" within the definition in s. 19 of the Poor Law Officers' Superannuation Act, 1896; and thirdly that under s. 32 of the Poor Law Amendment Act, 1844, and by art. 41 of the Accounts and Audit Order of January 14, 1867 (1), a district auditor has no power to surcharge any deficiency or loss unless it is incurred by the negligence or misconduct of the party accounting. The second point, whether the gratuities were emoluments, really depends upon the first—namely, whether the payment of them was legal, because illegal payments cannot be considered emoluments. Apart from the sanction of the Ministry of Health, the payments were illegal. The remuneration of a registrar of births and deaths is fixed by statute: the Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 29, and the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), s. 27. Any payment by guardians out of the rates beyond the amount fixed by those Acts is unauthorized and illegal. The sanction of the Ministry of Health has not the effect of converting an illegal payment into a legal one. The Minister of Health exercises the power of sanctioning payments as the successor, through the Local Government Board, of the Poor Law Commissioners who were empowered, by s. 4 of the Poor Law Audit Act, 1848, when any appeal was made to them against any allowance, disallowance, or

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(1) Poor Law Amendment Act, 1844, s. 32: "And be it enacted, that [certain persons] . . . . shall elect . . . . a person to be the auditor of the district . . . . and every auditor . . . . shall have full powers to examine, audit, allow, or disallow of accounts, and of items therein, relating to moneys assessed for and applicable to the relief of the

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poor . . . . and to all other money applicable to such relief; and such auditor shall charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is accountable, but not brought by him into account against such person, and shall certify on the face of every account audited by him any money . . . . found by him to be due from any person; and . . . . shall forthwith report the same to the . . . . Commissioners . . . . and all moneys so certified to be due by such auditor shall be recoverable as so certified from all or any of the persons making or authorising the illegal payment, or otherwise answerable for such moneys. . . . ."

General Order dated January 14, 1867, art. 41: "In auditing the accounts, the auditor shall see that . . . . the payments are supported by adequate vouchers and authority; and he shall ascertain whether all sums received . . . . are brought into account; and he shall examine whether the expenditure is in all cases such as might lawfully be made; and he shall reduce such payments and charges as are exorbitant, shall surcharge moneys not duly accounted for, or lost by negligence, upon the person who ought to account for the same, or whose negligence or improper conduct has caused the loss, and shall disallow and shall strike out such payments as are contrary to the Orders, Rules, and Regulations of the Poor Law Board, or are not otherwise authorized by law."

surcharge by any auditor in the accounts of any guardians, "to decide the same according to the merits of the case"; and if they should find that any disallowance or surcharge had been lawfully made, but that the subject-matter thereof was incurred in circumstances making it fair and equitable that the disallowance or surcharge should be remitted, they might, "by an order under their seal, direct that the same shall be remitted. . . . ." But the remission of the disallowance or surcharge did not make the payments which had lawfully been disallowed or surcharged legal payments; they still continued illegal: *Attorney-General* v. *Merthyr Tydfil Union*. (1) The power conferred on the Poor Law Commissioners by the Act of 1848 was somewhat enlarged by the Local Authorities (Expenses) Act, 1887, which enabled the Local Government Board to sanction payments before they had been disallowed, and provided that expenses paid by a local authority should not be disallowed by the district auditor if they had been so sanctioned. But this statute assumes that the payments are illegal, for if they were legal it is to be assumed that they would not be disallowed, and the sanction of the Local Government Board would be unnecessary. Therefore the payment of these gratuities remains illegal. When the district auditor finds that sums of money have been paid in respect of a superannuation allowance computed upon payments of which some were legally and others illegally made, his only course was to disallow so much of the pension as was based upon the illegal payments and to surcharge them.

The Divisional Court has held that there is no power to surcharge these payments upon the guardians who authorized them.

[Counsel proceeded to argue the other points raised in the Divisional Court—namely, the power of a district auditor to order repayment of an amount which he has properly disallowed, the power to surcharge payments made otherwise than by negligence or misconduct, and the power to order repayment by the persons who authorize the disallowed payments. But as the Court expressly declined to decide these points, the argument upon them is omitted.

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(1) [1900] 1 Ch. 516.

The following statutes were referred to: the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 89; the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), ss. 32, 33, 38, and 49; the Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), ss. 3, 4, 5, and 8, and the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 247, sub-s. 7.]

Wingate Saul K.C. and *J. Leonard Crouch* for the respondents. The effect of the Local Authorities (Expenses) Act, 1887, is to legalize expenses which have been sanctioned by the Local Government Board or the Minister of Health under the power conferred by that Act: *Attorney-General* v. *Rickmansworth Urban Council* (1), per Kekewich J. In *Attorney-General* v. *Merthyr Tydfil Union* (2) the Act was not referred to. But if the Act of 1887 does not operate to legalize those expenses to the full, at any rate the only authority to pronounce them illegal is the Court, and the Court will be very slow to interfere with the discretion entrusted to and exercised by the Minister of Health: *Roberts* v. *Hopwood.* (3) But whatever be the effect of the Act, the district auditor has no power to pronounce upon the legality of the expenses. He is expressly forbidden to do otherwise than allow them. So far as he is concerned the gratuities were payments made to an officer or servant as such for his own use within the meaning of s. 19 of the Poor Law Officers' Superannuation Act, 1896; for by the same section registrars of births and deaths are deemed to be in the service of the guardians in the union in which their districts are situated. Therefore either these gratuities were for all purposes "emoluments": *Rex* v. *Lyon* (4); or at the least they were payments which the district auditor was bound to treat as emoluments. Being bound to treat them as emoluments for one purpose he could not treat them as illegal payments for another. He was bound to allow the contributions in respect of them towards the common fund and bound in consequence to allow the superannuation allowance in so far as it is based upon those contributions.

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(1) (1902) 86 L. T. 521, 522.
(2) [1900] 1 Ch. 516.
(3) [1925] A. C. 578, 588.
(4) [1921] 1 K. B. 203.

Montgomery K.C. in reply. *Rex* v. *Lyon* (1) has no application to this case. The question there was whether certain payments, which the London County Council had made to their officers and servants employed at various mental hospitals, were made as remuneration for extra services or were gratuities; if they were for extra services they were emoluments; otherwise they were not. It was held that they were for extra services. That case supports the appellant.

BANKES L.J. The learned judges in the Divisional Court have expressed opinions upon several important matters, saying at the same time that it was not necessary to decide them. These opinions are therefore obiter and we need not discuss them. The Court did however decide one point, which arises in the following way.

There had been a disallowance by a district auditor and a consequent surcharge—using that word in the sense in which it is used in the Poor Law Statutes—of the amount on the individual guardians who had authorized the payments. The validity of this surcharge was challenged by a writ of certiorari on the ground that the auditor had no jurisdiction to make it. The payment which he had disallowed had been made by way of a superannuation allowance to a registrar of births and deaths. Two groups of statutes have to be considered; the first contains those which concern the position of the registrar and his remuneration, the second has to do with the powers of a district auditor under the Poor Law Acts and with the authority and jurisdiction of the Local Government Board, now the Ministry of Health; and particularly the power to regularize certain payments made by boards of guardians which otherwise might properly be objected to by the auditor at his audit. First, there is the Births and Deaths Registration Act, 1836, setting up the office of the registrar and providing for his appointment.

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(1) [1921] 1 K. B. 203.

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By s. 29 of that Act a registrar has to make out quarterly accounts of the number of births and deaths registered since the last account and verify and sign the account, and the guardians or overseers are to pay to the registrar such sums as he shall be entitled to receive on the account according to the scale mentioned in the section; for the first twenty entries 2*s.* 6*d.* each and 1*s.* for every subsequent entry in each year. Then it is necessary to refer to s. 27 of the Births and Deaths Registration Act, 1874, because under these two enactments a registrar derives his right to payment for the work he does. That section provides that "Every superintendent registrar and registrar respectively shall be entitled to the fees specified in the second Schedule to this Act, and every such fee shall be paid to him by the persons and on the occasions pointed out in such Schedule"—the informant, declarant or applicant as the case may be—"and may be recovered as a debt due to him, and subject to the prescribed rules he may refuse to comply with any application voluntarily made to him until the fee is paid." By s. 31, "The payment to the registrar under s. 29 of the principal Act"—the Act of 1836—"of 2*s.* 6*d.* for each of the first twenty entries of births and deaths in every year which he has registered shall be paid to him for each of the first twenty entries of births and deaths in each quarterly account made out and verified in manner directed by that Act." It follows that the payment to which a registrar of births and deaths is entitled is of an amount defined and limited by statute.

The appointment of auditors is also provided for by statute; their duties are prescribed and the payments which boards of guardians may make are defined, and there are provisions showing the extent of the district auditors' authority in disallowing payments improperly made and charging with those payments the accounting persons and persons who, though not actually accounting parties, are directly responsible for the payments, and requiring them to make reimbursement; and in my opinion the result of the legislation up to and including the Act of 1874 is that guardians, themselves a statutory authority with limited powers to lay out or expend moneys entrusted to their care, are committing an illegal act if they pay to a registrar more than the statutory fees prescribed and defined by the various Acts of Parliament which regulate his position and duties.

But the Minister of Health as successor to the Poor Law Commissioners and the Local Government Board is invested with power to deal with special cases in a special way. First by s. 4 of the Poor Law Audit Act, 1848, it is enacted that "Where any appeal shall be made to the said Commissioners"—the Commissioners for administering the laws for relief of the poor in England—"against any allowance, disallowance, or surcharge made by any auditor in the accounts of any guardians, overseers, or their officers, it shall be lawful for the said Commissioners to decide the same according to the merits of the case; and if they shall find that any disallowance or surcharge shall have been or shall be lawfully made, but that the subject-matter thereof was incurred under such circumstances as make it fair and equitable that the disallowance or surcharge should be remitted, they may, by an order under their seal, direct that the same shall be remitted, upon payment of the costs, if any, which may have been incurred by the auditor or other competent authority in the enforcing of such disallowance or surcharge." It is quite plain that this statute gave to the person surcharged a right of appeal and to the Commissioners a power of dispensation, where a district auditor had properly disallowed a payment which had been illegally made and had properly surcharged the person responsible for making it, and it conferred on the Commissioners jurisdiction to remit the disallowance if they considered it fair and equitable to do so. The effect of that section upon the payment itself has been considered in *Attorney-General* v. *Merthyr Tydfil Union* (1), where Lindley M.R. distinctly indicated his view that the Act did not give the Commissioners power to turn an illegal payment into a legal one, but only conferred a power to remit. An illegal payment, perhaps made bona fide but under a mistake, was not altered in character, and if the payment were challenged in a Court of law when it was intended or threatened, or indeed after it had been made, the Court must have expressed the opinion that nothing in this section had legalized what was obviously an illegal payment.

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(1) [1900] 1 Ch. 516.

So far in the history of this legislation the surcharging of illegal payments could be remitted only after the district auditor had held his audit and made his certificate. Then came the Local Authorities (Expenses) Act, 1887, which extended the jurisdiction conferred by the Act of 1848 and enabled the Local Government Board to sanction payments, although illegal, before they were audited; and precluded the district auditor from disallowing them. But I cannot see that the view of Lindley M.R. as to the legality of payments remitted under the Act of 1848 is in any way affected by this Act of 1887, which in my view has no more effect than the former Act upon the character of the payment which is challenged as being illegal.

In pursuance of the powers conferred by the last mentioned Act the Local Government Board issued a circular inviting Boards of Guardians to put registrars of births and deaths on the same footing as their other officers as regards war gratuities. The effect of the circular was that the registrar, Mr. Minter, received gratuities which, although apart from the Act of 1887 and the circulars they might have been challenged and disallowed, yet in the circumstances, as between the guardians, the Local Government Board, and the auditor, were authorized and recognized payments.

The first question arises: Were these gratuities part of the emoluments of the registrar's office? In ordinary circumstances I should be very loth to hold or to suggest that payments which were for all purposes illegal could be emoluments of a man's office; but the circumstances here are most exceptional, where although by a statute the salary of a man is limited to a particular amount and by another statute an official auditor is appointed to see that he is paid no more, yet by a third statute a Government department is entrusted with a dispensing power to inhibit the auditor from disallowing a particular payment, even before it is challenged, because the department allows it and notwithstanding it is in excess of the limited amount. In my opinion a payment made in these circumstances is by the last mentioned statute made part of the emoluments of the recipient.

Then comes the next stage in this case. The registrar retired. By the Poor Law Officers' Superannuation Act, 1896, he became entitled to a superannuation allowance based on a proportion of the amount of his salary or wages and emoluments. The district auditor contends that although he is precluded from disallowing these payments while they were being made as salary or emoluments, yet now that they have been so made he can challenge the superannuation allowance in so far as it is based upon them. I cannot assent to this contention. In my opinion it is not open to the auditor to argue that payments, which he could not deny were emoluments while they were being made, may now, when the man has retired and is no longer receiving them, be treated as if they never ought to have been and never were made. On this ground, which is the ground on which substantially the Divisional Court has decided, I think the appeal fails and should be dismissed.

With regard to certain opinions expressed in the Court below upon another branch of the case, but not, as I think, part of the decision—upon which therefore it is not necessary for us to give a decision—I only wish to add that when the question comes up for adjudication there will be a good deal to be said for the view that the poor law statutes do recognize a jurisdiction in district auditors to disallow illegal payments and surcharge them upon persons who, though not in the ordinary sense accounting parties, are yet persons who have primarily authorized the payments and are therefore responsible for making them; and that this jurisdiction may not be confined to payments made through misconduct or negligence. The decision of the Divisional Court ought not to be treated as a decision upon these points, and our decision is solely upon the question whether or not the district auditor had a right to challenge the particular payment in question in the circumstances of the case before us.

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SCRUTTON L.J. If it had been necessary to give a final decision upon all the opinions expressed by the Divisional Court and discussed by counsel for the appellant, I should certainly have desired to hear the respondents' case at greater length and to consider my judgment. But this appeal can be disposed of on a comparatively narrow ground, which is, I think, the ground upon which the majority of the Divisional Court have decided—namely, the position of the district auditor in the circumstances of this case.

The case arises thus: A registrar of births and deaths is remunerated, first, by a scale of fees depending on the number of births and deaths he registers, fixed by an Act of 1836; and, secondly, by a scale of fees contained in an Act of 1874 for services rendered in supplying certificates and copies of certificates, and in other ways, to persons who register. His fees are paid by the guardians; but he is not their servant and he cannot be dismissed or controlled by them, and, that being so, I see no power in them to pay him a salary or make him a gratuity. In consequence of the Great War the number of births fell greatly, the deplorable loss of life took place for the most part outside the jurisdiction of the registrars, and the cost of living reached an unexpected height. Not unnaturally it occurred to the Local Government Board that registrars were not sufficiently remunerated, and they issued two circulars suggesting to boards of guardians that they might safely make gratuities to registrars so as to put them in as good a position as their salaried servants, who were receiving increased remuneration by way of war bonus. Many boards of guardians, including the respondents, proceeded to grant gratuities to registrars, and undoubtedly those gratuities were sanctioned by the Local Government Board. By an Act of 1887 if the Local Government Board sanctioned a payment the district auditor was forbidden to disallow it, although it was, as in my opinion this gratuity was, illegal. So the respondents granted Mr. Minter this gratuity, and the district auditor was prevented from disallowing it as being illegal, whether he thought it legal or illegal. And when the Board of Guardians deducted

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from the gratuity the contribution fixed by the Superannuation Act, the district auditor did not raise any question, taking the view, rightly as I think, that if he was bound to allow the payment as legal he could not treat it as exempt from contribution to the superannuation fund on the ground that it was illegal. And thus for several years a percentage of Mr. Minter's gratuity was deducted each year and carried to the common fund of the union.

Then Mr. Minter retired, and the question of his pension arose. It was assessed on the basis that the gratuity was an emolument which must be taken into account in computing his pension. At this point the district auditor objected. He eliminated the gratuity from the calculation, thereby reducing the amount payable as pension to Mr. Minter, and disallowed the balance and surcharged those who voted for it. The question is, can the district auditor do that?

The powers of the Local Government Board with regard to these disallowances were regulated first by s. 4 of the Act of 1848, which provides that if an appeal is made to them against any allowance, disallowance, or surcharge by an auditor it shall be lawful for the Commissioners—the predecessors of the Local Government Board—to decide the same according to the merits of the case, and if they find that any disallowance was lawfully made—as it would be if the payment was illegal—but that the subject-matter of it was incurred in such circumstances as to make it fair and equitable that the disallowance or surcharge should be remitted, they could direct that it should be remitted. At a later stage the inconvenience of this process became apparent, by which if the Local Government Board approved of a payment their approval could not be signified or made effective until a district auditor had disallowed the payment; and so the Act of 1887 provided that if the Local Government Board sanctioned a payment, in which case they would of course remit any disallowance or surcharge of it, the payment should not be disallowed by the district auditor. It is true that in the *Merthyr Tydfil* case (1) the Act under consideration

(1) [1900] 1 Ch. 516.

was the Act of 1848, and that Lindley M.R. was expressing his view as to the effect of that Act upon the powers of the Court when he held that the power given to the Local Government Board to disallow a surcharge for equitable reasons did not prevent the Court from saying that the payment was illegal. That case related to the payment of poor law relief to strikers. The action was brought by the Attorney-General at the relation of a colliery company claiming a declaration that a board of guardians could not legally pay relief to strikers. The Local Government Board had not at that time sanctioned the payment; there had been no surcharge and no remission of any surcharge. The argument for the guardians was that the legality of the payment was, since the Act, a matter which had been confided to the discretion of the Local Government Board, who had power if the payment was illegal either to allow a surcharge or to disallow it if they thought it equitable so to do; and secondly, that the Court had consequently no power to make the declaration prayed for. Those were the circumstances in which Lindley M.R. used the memorable words, concurred in by the other members of the Court, on p. 546 of the report which has been cited to us. (1) It appears to me that those words apply to the statute of 1887 as well as to the statute of 1848, and that it is still within the jurisdiction of the High Court to issue a declaration that a payment is illegal in spite of the fact that a ministerial department has sanctioned it. I abstain from discussing whether the proper party to move the Court should be a ratepayer, or, as in the *Merthyr Tydfil* case (1), the Attorney-General at the relation of the ratepayers. I also abstain from discussing a matter on which there may be much argument—namely, whether such a proceeding can result in an order for repayment of a sum paid. But these matters do not affect the district auditor. He is precluded from disallowing, and a fortiori from surcharging, a payment which the Ministry of Health has sanctioned, and when he is prevented from disallowing and surcharging in respect of the payment itself he is equally prevented in respect of its consequences. If it were otherwise the relation between the district auditor, the guardians, and the Ministry of Health would be reduced to an absurdity. On this narrow ground, which is the main ground on which the Lord Chief Justice decided, I think the decision of the Divisional Court should be affirmed. I express no opinion upon the difference, if there be any, between s. 32 of the Poor Law Amendment Act, 1844, and s. 247 of the Public Health Act, 1875. It is not necessary for the decision of this case to decide, and I reserve for future discussion the question whether it is possible to say that there can only be a surcharge where there has been negligence or misconduct. On these matters the opinions expressed in the Court below were obiter, as the Lord Chief Justice says they were, and are not to be taken as binding upon the Divisional Court or any other.

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(1) [1900] 1 Ch. 516.

ROMER J. I am of the same opinion. The first question is whether in ascertaining the superannuation allowance of the registrar of births and deaths the district auditor was or was not bound to treat as an emolument of the registrar the gratuity paid to him year by year with the sanction and at the instance of the Ministry of Health. If he was so bound this appeals fails. Now for the purposes of the Act of 1896 "emolument" has been defined by s. 19 as including "all fees, poundage, and other payments made to any officer or servant as such for his own use." This gratuity was undoubtedly paid to the registrar for his own use. By the same section it is provided that for the purpose of the Act registrars of births and deaths are to be deemed to be in the service of the guardians. So far there is no doubt. But it is said that only those payments can be treated as part of a registrar's emoluments which are legally made, and that these payments were not legally made; and indeed, although these payments were sanctioned by the Ministry of Health, I think, for the reasons given by the Lords Justices, they were not legal payments. But in my opinion in view of the language of the Local Authorities (Expenses) Act, 1887, the district auditor for the purposes of his audit

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was bound to treat them as having been legally made, and therefore as emoluments. For these and no other reasons I think the appeal should be dismissed.

Other interesting and difficult points have been raised; they have not been fully argued and I have not formed a final opinion upon them. But as at present advised I think there is good ground for the contention that the words "negligence or misconduct" in s. 32 of the Act of 1844 refer only to cases where an accounting party is surcharged in the strict meaning of that word, that is to say where he is being made responsible for sums which he has not in fact received, but which he ought to have received.

Appeal dismissed.

Solicitors for appellant: *W. W. Young, Sons & Ward.*
Solicitors for respondents: *Sharpe, Pritchard & Co.*

W. H. G

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April 28, 29.

SKINNER (APPELLANT) *v.* JACK BREACH, LIMITED (RESPONDENTS).

Master and Servant—Wages—Minimum Wage—Trade Board—"Specified trade"—Workers in specified Trade—Employer in different Trade—Trade Boards Act, 1909 (9 *Edw.* 7, *c.* 22), *ss.* 2, 4, *sub-ss.* 1, 2; *s.* 6—*Trade Boards Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 32), *ss.* 1, 3, *sub-s.* 1.

By Orders made under the Trade Boards Acts, 1909 and 1918, the Minister of Labour directed that those Acts should apply to "the mending, refitting and reconditioning of drift nets," which thereby became a "specified trade" within the meaning of the Acts, and in due course the trade board fixed for certain classes of female workers in the trade minimum rates of wages, which were made obligatory by an Order of the Minister of Labour.

The appellant, one of the workers in respect of whom the trade board had fixed minimum wages, had been employed for over three years, and was employed, with thirty other women, by the respondents, who were fishermen and owners of fishing boats, in mending drift nets, which were exclusively the property of the respondents and were only used by them in their business:—

Held, that the Trade Boards Acts applied to workers in a "specified trade" by whomsoever they were employed, if their employment was regular and for commercial purposes, and not only to workers employed in a "specified trade" by an employer who was solely engaged in the same trade, and, therefore, the respondents were bound to pay to the appellant the minimum wage fixed by the trade board for workers of her class in her branch of industry.

CASE stated by Lowestoft justices.

At a Court of summary jurisdiction an information under the Trade Boards Acts, 1909 and 1918, and an Order made by the Minister of Labour (1) under them on June 24, 1926, was preferred by the appellant, Agnes Lawson Skinner, an officer appointed under the Trade Boards Act, 1909, against the respondents, Jack Breach, Ld., a limited company, alleging that the respondents, as employers of workers in branches of the rope, twine and net trade in Great Britain, for which a minimum rate of wages had been fixed by the Drift Nets Mending Trade Board (Great Britain), in pursuance of the Trade Boards Acts, 1909 and 1918, did on July 10, 1926, at Lowestoft, unlawfully fail to pay wages at not less than the minimum rate to Edith Alice Finch, one of the said workers. (2)

On the hearing of the information the following facts were proved or admitted:—

By the Trade Boards (Rope, Twine and Net) Order, 1919 (St. R. & O., 1919, No. 930), as amended by the Trade Boards (Rope, Twine and Net and Drift Nets) Order, 1925 (St. R. & O., 1925, No. 785), the Minister of Labour directed that the Trade Boards Acts, 1909 and 1918, should apply to "the mending, refitting and reconditioning of drift, seine or similar nets including all processes (whether similar to the foregoing

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(1) The powers and duties of the Board of Trade under the Trade Boards Act, 1909, were transferred to the Minister of Labour by the New Ministries and Secretaries Act, 1916.

(2) The Trade Boards Act, 1909, s. 6, provides: "Where any minimum rate of wages fixed by a trade board has been made obligatory by Order of the Board of Trade under this Act, an employer shall, in cases to which the minimum rate is applicable, pay wages to the person employed at not less than the minimum rate clear of all deductions, and if he fails to do so shall be liable . . . . to a fine. . . . ."

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or not) incidental thereto." By the Trade Boards (Drift Nets Mending Trade, Great Britain) (Constitution and Proceedings) Regulations, 1925 (St. R. & O., 1925, No. 891), a trade board was established in Great Britain for "the following branch of work in the rope, twine and net trade . . . . that is to say, the mending of the net mesh of drift seine or similar nets. . . . ." Subsequently general minimum time and overtime rates were fixed by the trade board for certain classes of female workers, and were confirmed by an Order of the Minister of Labour dated June 24, 1926 (1), by which it was directed that they should become effective from June 28, 1926.

The respondents carried on the business of fishing and of owning and using their own boats for that purpose. Edith Alice Finch had been employed since March, 1923, and was still employed by them, with thirty other women, as an adult female worker in the mending of drift nets which were the property of the respondents and were used by them in their business as fishermen and fishing boat owners. The business of the respondents did not include the manufacture or repair of nets other than the repair of nets owned by them and used in their business. On July 10, 1926, Edith Alice Finch was paid as wages for the week ending July 9, 1926, the sum of 17*s.*, being 15*s.* for a week of 43½ hours' work, and in addition thereto a sum of 2*s.* for repairs to two nets completed, by way of bonus of 1*s.* each net. The minimum rates of wages fixed by the trade board for workers who had completed two years of employment in the drift nets mending trade were 22*s.* per week of 44 hours, or 21*s.* 10*d.* per week of 43½ hours.

On behalf of the appellant it was contended that the respondents carried on the trade of mending drift nets, in which trade Edith Alice Finch was employed, and that that employment was subject to the Trade Boards Acts, 1909 and 1918, by the operation of the Orders of the Minister of Labour.

On behalf of the respondents it was contended that if the business of drift fishermen and fishing boat owners constituted a trade (which was denied), the mending of drift nets, which was incidental thereto, was no part of that trade or of any trade, and that before the Minister of Labour could make an Order there must be a trade to which he could apply it, and that the Trade Boards Acts, 1909 and 1918, and the Orders and Regulations made under them did not apply to the mending of drift nets by the workers employed by the respondents in the circumstances described.

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(1) See note (1) ante, p. 221.

The majority of the justices were of the opinion that, as the respondents only repaired their own gear or nets, which were used for their own purposes, they were not carrying on a trade as provided for by the Trade Boards Acts, which only applied to operations carried on as a trade, and the information was accordingly dismissed.

The appellant being dissatisfied with this decision the justices stated this case for the opinion of the Court whether they had come to a correct determination in point of law.

Sir Douglas Hogg A.-G. and *Lilley* for the appellant. The decision of the majority of the justices was wrong. They appear to have taken the view that the word "trade" in the Trade Boards Acts connotes mere buying and selling, but in many statutes the Legislature has used the word in a wider sense. In s. 19 of the Truck Act, 1831 (1 & 2 Will. 4, c. 37), "trade" was used as meaning vocation or occupation, and that section, which provided that the Act should apply to workers in (inter alia) coal or ironstone mines, did not cease to apply to employers if the coal or ironstone was to be used in their own factories as fuel or raw material. "Trade" in the House Tax Act, 1817 (57 Geo. 3, c. 25), and the Revenue Act, 1869 (32 & 33 Vict. c. 14), has been held not to be confined to buying and selling, but to apply to any business, e.g., that of a telegraph company: *Chartered Mercantile Bank of India, London and China* v. *Wilson.* (1)

[LORD HEWART C.J. referred to *In re Incorporated Council of Law Reporting for England and Wales* (2), a case under the Customs and Inland Revenue Act, 1885.]

In the Trade Disputes Act, 1906, "trade" is clearly used with reference to the relationship of employer and workman.

(1) (1877) 3 Ex. D. 108. (2) (1888) 22 Q. B. D. 279.

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In the Trade Boards Acts, the object of which is to prevent the underpayment of workers, "trade" is used in the sense of the operations which are carried on by the worker by way of business: see s. 1, sub-ss. 1 and 2; s. 4, sub-s. 1, and other sections of the Act of 1909; and it is immaterial that the employer is engaged in a trade different from that which he employs the worker to carry on. Sect. 5, sub-s. 2, and s. 6, sub-s. 1, of the Act of 1909, are in general terms, and refer to "all persons employing labour," "all persons employed" and "an" employer. Sect. 9, which compels the payment of the minimum wage to those who might be thought to be independent contractors, shows that the Legislature regarded the matter from the point of view of the worker and his work, and wished to secure that a worker who was commercially employed should receive proper wages for his work, whatever the object for which that work was produced. The section provides for that payment by "any" shopkeeper, dealer, or trader who employs "any worker" to do "any work," not only the work of the employer's trade or work for sale. The Schedule to the Act refers to the "making of boxes" and "tailoring," and the Act applies not only to box makers and tailors employed by master box makers and master tailors, but also, for instance, to box makers employed by a confectioner to make boxes for his own confectionery and to tailors employed by a large firm of retailers or restaurant proprietors to make uniforms for their staff. In the present case the respondents by way of trade employed the appellant in mending drift nets, which is a specified trade within s. 1, sub-s. 2, of the Act of 1909, and they were, therefore, bound to pay to her the minimum rate of wages which had been made obligatory.

[He distinguished *Palmer* v. *Snow* (1); *Nash* v. *Hollinshead* (2); *Curtis* v. *Shinner* (3); and *Attorney-General* v. *Plymouth Corporation*. (4)]

Neilson K.C. and *Dodson* for the respondents. "Trade" in the Trade Boards Acts means the industrial operations

(1) [1900] 1 Q. B. 725.
(2) [1901] 1 K. B. 700.
(3) (1906) 95 L. T. 31.
(4) (1909) 100 L. T. 742.

performed by a worker whose employer is engaged in the same business. The term contemplates a business with all that it involves—employers, workers and work—and the Minister of Labour can only make an Order which brings within the Acts a particular trade which is a unit of business in this sense. The Acts do not apply to workers who are employed by an employer who is engaged in a business to which the workers' trade is merely ancillary, nor to workers whose employer is not himself within the Acts for the reason that he carries on the same specified trade. Here the respondents' trade or business was that of fishermen, not that of net menders. The work of the worker must be productive of direct gain to the employer for the employment to fall within the Acts on the same principle as a private hotel laundry is not a "laundry carried on by way of trade, or for purpose of gain" within the Factory and Workshop Act, 1895, even though the clothing of visitors is washed there for remuneration: *Caledonian Ry. Co.* v. *Paterson.* (1)

LORD HEWART C.J. The question for our decision in this case may be stated in the following way: "Do the Trade Boards Acts apply only to a person employed in one of the 'specified trades' by an employer who is engaged in the same trade, or do they apply also to a worker in a 'specified trade' by whomsoever he is commercially employed?" Our attention has been directed to a series of cases, of which, perhaps, the chief is *Nash* v. *Hollinshead* (2), to show that the respondents did not carry on the trade of drift net mending. It is a little important to remember that that case and the other cases of the same class that were cited turned on the meaning of words in different Acts of Parliament which had a different purpose.

We have to regard the true meaning of the Trade Boards Acts and the Orders and Regulations made under them. No doubt in a great many contexts the word "trade" indicates a process of buying and selling, but that is by no means an exhaustive definition of its meaning. It may

(1) (1898) 1 F. (Just.) 24.

(2) [1901] 1 K. B. 700.

also mean a calling or industry or class of skilled labour. When one looks at Acts of Parliament like the Trade Disputes Act, 1906, it appears that the word "trade" is commonly used to indicate the position created by the relation of employer and employed in certain branches or classes of industry. For example, a compositor says that his trade is that of a compositor and an engineer that his trade is engineering, while trade unions are spoken of under the name which indicates the particular calling, industry or occupation of the skilled craftsmen who are their members.

In the Trade Boards Act, 1909, the first provision is that the Act shall apply to the "trades" specified in the Schedule to the Act, and that Schedule refers to "tailoring," the "making" of boxes and chains, lace and net "finishing," and "mending" and "darning operations," as being the "trades" to which the Act applies. "Trade" is used in the same sense in s. 1, sub-s. 2, while in the Trade Boards (Rope, Twine and Net and Drift Nets) Order, 1925, with which we are concerned here, other verbal nouns are used—namely, the "mending," "refitting" and "reconditioning" of drift, seine or similar nets. Sect. 2, sub-s. 1, of the Act of 1909 provides for the establishment of trade boards "for any trade to which this Act applies or for any branch of work in the trade," and s. 6 prescribes a penalty on "an" employer who fails to pay wages in accordance with the minimum rate which has been made obligatory. The meaning which has to be collected from phrases like that—and they by no means stand alone—and from the whole scheme and purpose of the Act is reinforced by the particular language of s. 9. That section, no doubt, deals with an individual matter, but it contains words which illuminate the purpose of the statute as a whole. It shows that, even where an outworker, or a worker who provides some of the requisite materials or tools, is concerned, the Act regards the nature of the work performed, and that, if the worker is doing a kind of work to which a minimum rate of wages applies, it matters not that the "shopkeeper, dealer, or trader" would not describe his business, or the whole of it, by words applicable to that particular branch of industry.

Doubtless questions may arise about where the line is to be drawn. Illustrations were put in argument of the nature of a reductio ad absurdum. It is enough to say that casual work is not within the scope of the Acts, nor is work given to another by a private person. There must be trade in the sense of commercial employment, but if that is present it does not matter that the description of the work done by the worker is not exhaustive of the description of the whole business of the employer. To apply that interpretation to the facts of the present case, although the business of the respondents may truly be described as that of fishermen and owners of fishing boats, they employed, not casually but regularly, not privately but for commercial purposes, a considerable number of women in the work or industry of mending nets. It is immaterial that mending nets was not the whole of the respondents' business. In my view, therefore, the decision of the justices was wrong. This appeal must be allowed and this case remitted to the justices with a direction to convict the respondents.

AVORY J. I have arrived at the same conclusion after some hesitation. At first I was disposed to think that the Trade Boards Acts and the Orders made under them applied only to cases where employer and employed were engaged in the same "specified" trade. The contention of the appellant before the justices rather gave colour to that view, because it was that "the respondents carried on the trade of mending drift nets." In my opinion, the respondents did not carry on the trade of mending drift nets, and if it had been necessary to establish that they did so before they could be convicted I should have thought that the justices' decision was correct. But, after considering particularly s. 9 and s. 6 of the Act of 1909, I have come to the conclusion that the Statutes and the Orders under them cannot be construed in that limited sense, as I thought they might. Sect. 9. as my Lord has pointed out, applies to "any" shopkeeper, dealer, or trader who employs "any" worker to perform "any" work for which a minimum rate of wages has been fixed under the Act. That clearly contemplates a shopkeeper, dealer, or trader who, for his own convenience, employs a worker to do some work which may be that of another trade. Sect. 6 is also quite general in its terms. When it says that " an " employer shall pay at least the minimum rate of wages it means that " any " employer shall do so. That leads me to the conclusion that it is sufficient, to bring an employment within the terms of this Act, if an employer who carries on one kind of trade employs a worker to do the work of some other trade which is incidental to the employer's trade or business. At the same time, I think, the Acts are not intended to apply to a private individual who gives a casual job to some worker in a particular trade.

Of the cases which have been cited that which is nearest to the present matter is that of *Curtis* v. *Shinner* (1), where the Court had to decide whether a warehouse in which persons mended nets belonging to their employer's fishing boats and used by him in his fishing business was a workshop within the meaning of the Factory and Workshop Act, 1901. It does not appear to me that that decision governs this case.

For these reasons I agree that this case should be remitted to the justices with a direction to convict the respondents and to impose on them a penalty in their discretion.

SHEARMAN J. I am of the same opinion. The magistrates, I think, were misled by cases which were decided under other Statutes in which " trade " might have some different meaning from that which it has in the Trade Boards Acts. In my judgment, when s. 1 of the Act of 1909 is perused, and when the reasons for the Acts and the remedy afforded by them are considered, it is apparent that the dominant meaning of " trade " in those Acts is " industry." That seems to me to be its nearest synonym. The Legislature intended that, wherever it was discovered that a recognized form of industrial employment was underpaid, provision should be made by the machinery set up by the Acts that the industrial workers in that kind of industry should be properly

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(1) 95 L. T. 31.

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paid. Sect. 9 provides that that shall be the case even with outworkers. In my opinion, the effect of s. 1, sub-ss. 1 and 2, s. 2, sub-s. 1, and s. 4, sub-s. 1, is that a trade board may fix the rate of wages in any specified industry between employer and employed. "Specified" does not mean anything which the Minister of Labour chooses to call a trade; a "specified trade" must be a recognized species of industrial work. If there was a recognized species of industrial work known as net mending, and if it was carried on by way of a trade, the trade board had power to fix rates of wages between the workers who carried on that employment by way of trade and their employers, and those rates of wages apply whatever other business the employers may carry on. Therefore the justices were wrong, and this case must be remitted.

Appeal allowed; case remitted.

Solicitor for appellant: *Solicitor to the Ministry of Labour.*

Solicitors for respondents: *Botterell & Roche, for Chamberlin, Talbot & Bracey, Great Yarmouth.*

G. F. L. B.

THE KING *v.* MINISTER OF HEALTH.

Ex parte WORTLEY RURAL DISTRICT COUNCIL.

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April 29.

Rating—Valuation—Assessment Area—Scheme—Assessment Committee—Constitution—Representation of Rating Authorities, Boards of Guardians and Councils of Counties—Mode of Representation of various Groups of Authorities—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *ss.* 16, 17, 67.

By s. 16 of the Rating and Valuation Act, 1925, the council of every county shall make and submit to the Minister of Health a scheme for the constitution of assessment areas; and in making schemes regard must be had to the population and rateable value of the rating areas affected by the scheme.

By s. 17, sub-s. 1, there is to be an assessment committee for every assessment area.

By sub-s. 4: In the case of an assessment area not being a county borough "the assessment committee shall consist of persons to be appointed by the following authorities, being authorities whose area

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or any part of whose area is comprised in the assessment area, that is to say, rating authorities, boards of guardians and the councils of counties, and the proportion in which the said authorities shall be represented shall be determined by the scheme constituting the area."

A county council made and submitted a scheme to the Minister of Health which was approved by the Minister with modifications. Under the scheme as modified and approved an assessment area was constituted consisting of seventeen constituent areas, including the area of a rural district the council of which were the applicants for the rule. An assessment committee was purported to be created for the assessment area consisting of twenty-eight members, each of the various urban and rural districts and boards of guardians within the assessment area being allotted a certain number of representatives. A rule nisi for a certiorari was obtained to remove into the High Court for the purpose of being quashed the order of the Minister approving the scheme, on the ground that the constituent authorities were entitled to decide among themselves (1.) on the size or number of the assessment committee, and (2.) on the mode of representation of their own group:—

Held, that the words in s. 17, sub-s. 4, "the proportion in which the said authorities shall be represented shall be determined by the scheme," did not mean that the mere proportion and nothing more should be determined by the scheme; that the words "the said authorities," were not to be read as meaning the said groups of authorities; and that, inasmuch as under the scheme the total number of the members of the assessment committee had been fixed, and as the proportion between the various groups of authorities could be readily ascertained from the number of representatives accorded to each particular authority, the scheme complied with the requirements of the Act.

Observations upon the powers of the Minister of Health under s. 67 to remove difficulties.

RULE NISI for a writ of certiorari calling upon the Minister of Health to show cause why a certain order dated November 12, 1926, whereby the Minister purported to approve with modifications a scheme, dated July 21, 1926, made by County Council for the West Riding of Yorkshire under the Rating and Valuation Act, 1925, should not be removed into the High Court for the purpose of being quashed.

The rule was obtained upon the grounds that under the Rating and Valuation Act, 1925, the constituent authorities were entitled to decide amongst themselves: (1.) on the size or number of the assessment committee, and (2.) on the mode of representation of their own group.

The Rating and Valuation Act, 1925, which is entitled: "An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates . . . ." provides by s. 16, sub-s. 2, that "as soon as may be after the passing of this Act the council of every county shall, after consultation with the authorities of the rating areas in the county and with the boards of guardians of the poor law unions situate wholly or partly in the county, make and submit to the Minister a scheme for the constitution of assessment areas consisting of one or more rating areas." Sub-s. 6: "No scheme submitted to the Minister under this section shall be of any effect unless and until it is approved by the Minister. . . . ." Sub-s. 10: "In making schemes under this section regard shall be had to the population and rateable value of the rating areas which will be affected by the scheme and to the desirability that each assessment area shall have an administrative centre which is appropriate for the carrying out of the work of assessment in the area and convenient for the attendance of the persons interested therein, and that suitable premises for the transaction of the business of the assessment committee for the assessment area shall be available without unnecessary expenditure."

By s. 17, sub-s. 1: "There shall be an assessment committee for every assessment area." Sub-s. 2: "The assessment committee for an assessment area shall, in the case of an assessment area being a county borough, be appointed as soon as may be after the passing of this Act, and in the case of any other assessment area shall be appointed as soon as may be after the assessment area has been constituted, and as from the appointed day assessment committees shall exercise such powers and perform such duties as are conferred on them by this Act, and all assessment committees constituted under the Union Assessment Acts, 1862 to 1880, shall cease to exist." Sub-s. 3: "In the case of an assessment area being a county borough, the assessment committee shall consist of such number of persons to be appointed by the council of the borough as may be determined by the council, and of the persons to be so appointed not less than one-quarter shall be persons appointed to represent the boards of guardians of any unions any parts of which are comprised in the area of the borough and not less than one-fifth shall be persons who are neither members of the council of the borough nor members of any such board of guardians as aforesaid. The persons appointed as aforesaid to represent boards of guardians shall be persons nominated by the boards." Sub-s. 4: "In the case of any other assessment area the assessment committee shall consist of persons to be appointed by the following authorities, being authorities whose area or any part of whose area is comprised in the assessment area, that is to say, rating authorities, boards of guardians and the councils of counties, and the proportion in which the said authorities shall be represented shall be determined by the scheme constituting the area."

It appeared from the affidavit of the clerk to the Wortley Rural District Council (the Wortley Rural District being a district within the West Riding of Yorkshire), on whose behalf the application for the writ of certiorari was made, that by an order dated November 12, 1926, the Minister of Health purported to approve with modifications a scheme made under the Rating and Valuation Act, 1925, by the County Council for the West Riding of Yorkshire and dated July 21, 1926. Amongst the assessment areas defined by such scheme was the Staincross Assessment Area. By para. 7 of the final scheme as modified and approved the Staincross Assessment Area consisted of the Wortley Rural District area and sixteen other smaller areas, making a total estimated population for the new area of 143,478 persons with an assessable value of 707,494*l.* The Wortley Rural District alone had a population estimated at 28,950 persons with an assessable value of 182,758*l.* An assessment committee was purported to be created for the assessment area consisting of twenty-eight members, of whom the Wortley Rural District Council were to appoint two. The final scheme for the Staincross Area further provided that thirteen urban districts should each appoint one representative, one urban district should appoint two representatives, three boards of guardians

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should each appoint two representatives and the county council should appoint three representatives, whilst in addition to the two representatives allotted to the Wortley Rural District Council two other rural districts were allotted one representative each. Save as aforesaid the scheme did not purport to determine the proportion in which rating authorities, boards of guardians, and the county council should be represented. The affidavit further stated that the county council had thus purported to decide and the Ministry of Health to approve how the members allocated to each particular group of authorities should be distributed among such authorities inter se, and to fix the total number of members of the committee. The question of rateable value was of particular importance, because under s. 53 of the Act it was the basis on which the expenditure of the assessment committee is charged amongst the constituent rating areas. It was submitted that within the limits of the proportions to be fixed by a scheme the constituent authorities were entitled to decide amongst themselves (1.) the size of the assessment committee, and (2.) the mode of representation for their own group. It was further submitted that in making the scheme the county council, and in approving the same the Minister of Health, had not complied with the terms of the Act of Parliament with regard to the matters within their jurisdiction and had exceeded their jurisdiction in that they had purported to create an assessment committee for the proposed new area and to fix the number of members thereof, and in that they had purported to fix the number of members for each of the constituent authorities, and that the scheme did not determine the proportion for each group of constituent authorities.

It further appeared from affidavits filed on behalf of the County Council of the West Riding of Yorkshire and on behalf of the Minister of Health that the objections of the Wortley Rural District Council when the proposals for the scheme were submitted to them were that the present area of the Wortley Union was sufficiently large both as regards rateable value and population to form a separate assessment area, and that therefore the existing area of the Wortley Union Assessment Committee ought not to be enlarged or diminished. They further objected that the proposals with regard to representation were unfair to the Wortley Rural District, certain rating areas, whose combined population and rateable value were comparable with the population and rateable value of the area of the Wortley Rural District, being given a representation of nine members, whereas only two members were allotted to the Wortley Rural District. It was further said that there was no convenient centre for the Wortley Union other than at Grenoside, as at present. The county council said that they had no intimation prior to the application for the rule nisi that the Wortley Rural District Council raised any objection to the scheme on any of the grounds stated in support of the application for the rule.

Sir Douglas Hogg A.-G. and *W. Bowstead* showed cause against the rule on behalf of the Minister of Health.

J. Scholefield K.C. and *Maurice FitzGerald* for the West Riding of Yorkshire County Council.

R. M. Montgomery K.C. and *St. J. Micklethwait K.C.* in support of the rule on behalf of the Wortley Rural District Council.

LORD HEWART, C.J. [after reading the rule nisi and s. 16, sub-ss. 2 and 10, and s. 17, sub-ss. 1, 2, 3 and 4, of the Rating and Valuation Act, 1925, continued as follows:] The controversy in this case has chiefly turned upon the construction of sub-s. 4 of s. 17 of that Act. The argument that was made by those who support the rule may, I think, be stated in this way. They say that the statute requires the scheme to determine the proportion of representation as between the three different kinds or types or groups of authorities, that is to say, rating authorities, boards of guardians and county councils, but that the statute neither requires nor permits the scheme to prescribe either the total number of representatives composing

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the assessment committee or the number of representatives whom a particular rating authority or a particular board of guardians or a particular county council is to appoint. The question therefore turns largely upon the true construction of sub-s. 4 of s. 17. It is conceded by Mr. Montgomery in argument that under this section read together with other parts of these sections the county council may be empowered to determine the number of representatives composing the assessment committee. But he denied that the county council can do more, having appointed the total number, than to decide the proportion of representation as between the three various groups of authorities. In my opinion that construction must do some violence to the words of this sub-section. It involves, I think, two things: (1.) That the phrase "the proportion in which the said authorities shall be represented shall be determined by the scheme" means the mere proportion and nothing more; (2.) that the words "the said authorities" are to be read as if they were "the said kinds or types or groups of authorities." Now it is not denied that in the course which has in fact been taken by the county council in making the scheme and by the Minister of Health in approving it the total number of representatives constituting the assessment committee has been fixed, and the proportion in which the said authorities shall be represented has been fixed. But the proportion is not stated superficially as a proportion between groups of authorities. The proportion can be ascertained from an examination of the number of representatives accorded to each particular example of the various kinds of authorities. I am not suggesting that these words are not open to some criticism on the ground of ambiguity. But, looking at the purpose of the Act and at the scheme as a whole, I think that, even if the words be open to two constructions, we ought to adopt that construction which makes for good sense and the working of the Act. The other construction seems to me to lead to chaos and uncertainty in a remarkable degree. I think therefore that this case fails. I think the contention that there has been here a usurpation or excess of

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jurisdiction on the part of the Minister of Health or the county council fails.

I should like to add that there is a very remarkable provision in this statute which may interest those persons, if there are any, who observe the progress of departmental authority. Sect. 67, sub-s. 1, provides: "If any difficulty arises in connection with the application of this Act to any exceptional area, or the preparation of the first valuation list for any area"—these are words of remarkable comprehensiveness—"or otherwise in bringing into operation any of the provisions of this Act," the Minister of Health may do a series of remarkable things. He "may by order remove the difficulty." The imagination fails to contemplate at one view the extent and variety of the power which is given to the Minister under those words. He may by order remove the difficulty. He may cut the Gordian knot in any way that seems best to him. He may "declare any assessment committee to be duly constituted"; he may "make any appointment, or do any other thing, which appears to him necessary or expedient for securing the due preparation of the list or for bringing the said provisions into operation." The legislature, not content with arming the Minister with these remarkable and varied and far-reaching powers, goes on to provide that "any such order may modify the provisions of this Act so far as may appear to the Minister necessary or expedient." For what purpose? For carrying the Act into effect? Not at all—"for carrying the order into effect." This I think, though I say it with some hesitation, may be regarded as indicating the high-water mark of legislative provisions of this character. It is obvious that if this Court had taken another view of the case presented to us to-day and had decided to quash this order as having been made ultra vires, the Minister might to-morrow, under the provisions of s. 67, have arrived at the same end by making an order and removing the difficulty.

In my opinion the argument on behalf of those who support this rule has failed, and I think that this rule nisi ought to be discharged.

AVORY J. I am of the same opinion and have nothing to add.

SHEARMAN J. I agree.

Rule discharged.

Solicitors for Wortley Rural District Council: *Torr & Co.*

Solicitors for West Riding of Yorkshire County Council: *Warwick Williams & Marchant, for J. C. McGrath, Wakefield.*

Solicitor for Minister of Health: *Solicitor to Ministry of Health.*

R. F. S.

LORDEN *v.* BROOKE-HITCHING AND OTHERS.

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Feb. 1, 2, 15.

Landlord and Tenant—Covenant not to use Premises for Trades of Alehouse Keeper, Tavern Keeper or Licensed Victualler—Construction—Restaurant —Wine and Beer Licence—Conditions—Beerhouse Act, 1830 (11 *Geo.* 4 *and* 1 *Will.* 4, *c.* 64), *s.* 31—*Refreshment Houses Act,* 1860 (23 *&* 24 *Vict. c.* 27), *s.* 44—*Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 45.

Covenant in a lease that none of certain specified trades or businesses, including those of "alehouse keeper, beerhouse keeper, tavern keeper, licensed victualler," or any other trade or business which shall be dangerous or a nuisance or annoyance to the occupier of any other premises in the neighbourhood shall be carried on or exercised upon the premises;—

Held, not to include the business of a restaurant licensed as such and properly conducted.

ACTION tried by Salter J. without a jury.

The following statement of the facts of the case is taken substantially from the written judgment of Salter J.:—

By a lease dated May 31, 1920, the Duke of Westminster, the freeholder, demised to J. W. Lorden, Esq., certain land and premises at the corner of Oxford Street and Park Lane for eighty-eight and a half years from Lady Day, 1914. Clause 11 of the lease contained a covenant by the tenant enumerating various trades which were not to be carried on on the demised premises during the term without the permission of the lessor, among these trades being those of alehouse keeper, beerhouse keeper, tavern keeper and licensed victualler. (1) Mr. Lorden spent a large sum of money in building on the demised land, and by a sub-lease dated June 11, 1920, he sublet the premises, being Nos. 509, 511, 513 and 515 Oxford Street, and 40 Park Lane, to Sir Thomas Brooke-Hitching for eighty-eight and a half years less ten days from Lady Day, 1914, at a rent of a peppercorn for the first six years and thereafter rising from 10,000*l.* to 14,000*l.* a year. Clause 11 of this lease was identical with clause 11 of the head lease (1), except that the permission both of the lessor and the freeholder was required. By a sub-lease dated November 8, 1920, Sir Thomas Brooke-Hitching sublet a

(1) The covenant in the lease of May 31, 1920, was as follows: "11. That during the said term no forge shall be placed or set up or remain upon the said demised premises or any part thereof, nor shall the said demised premises or any part thereof be used as a place of public entertainment, nor shall any of the trades or businesses following (that is to say): those of a butcher, pork-butcher, fishmonger, slaughterer, knacker, horse boiler, hog skinner, catgut spinner, cart grease or varnish maker, melter of tallow, soap boiler, melter of fat, tripe boiler, tripe seller, fried fish seller, sausage maker, sugar baker, fellmonger, dyer, scourer, alehouse keeper, beerhouse keeper, tavern keeper, licensed victualler, gambling or betting house keeper, brass or iron founder, blacksmith, whitesmith, coppersmith, working brazier, pewterer, tin or ironplate worker, packing case maker, undertaker, coffin maker, glass maker, farrier, gold beater, beater of flax, hemp or feathers, beater of carpets, bone boiler, cork burner, chimney sweeper, dealer in soot, dealer in second-hand clothes, boots or shoes, dealer in old iron, or marine stores, or any other art, trade, business or employment whatsoever which shall be dangerous or a nuisance or annoyance to the tenant or occupier of any messuage, suite, flat or other hereditament in the neighbourhood of the premises hereby demised, be carried on or exercised upon the said demised premises without the express previous written consent of the ground landlord for the time being, and as to any part of the said demised premises which is or shall be permitted to be used for the supply of milk then so long as it shall be so used there shall be placed upon the pavement from the kerb to the shop door an india rubber or other sufficient mat to prevent noise whenever milk churns or cans are being taken into or from the said demised premises, and there shall be placed on the said premises a wooden grid where and whenever milk churns or cans are being placed or cleaned therein, and such other means shall be taken to prevent nuisance or annoyance to the tenants or occupiers of any adjacent premises as may be required by the ground landlord for the time being."

The covenant in the sub-lease of June 11, 1920, was in similar terms, except that it prohibited the carrying on of any of the said trades without the consent of the lessor as well as of the ground landlord.

part of the premises, being Nos. 513 and 515 Oxford Street, to Maude & Co. This sub-lease contained a covenant by the tenants to use the premises only for the business of pastry cooks, confectioners, tea rooms and general restauranteurs and caterers, unless with the lessor's consent, and that, in the event of such consent being obtained, they would not carry on any business which might depreciate the value of the premises or become a nuisance or annoyance to the occupiers of any other part of the building or which might affect the amenities and privacy of the residential portion of the buildings nor use the premises for an illegal or immoral purpose. Maude & Co. carried on a restaurant on these premises, and they obtained a licence dated April 1, 1921, to keep open the premises as a refreshment house. They had no licence for the sale of excisable liquor. Maude & Co. assigned their interest to Callard, Stewart & Watt, Ld., who carried on the business of confectioners and restaurant keepers. The benefit of the refreshment house licence obtained by Maude & Co. was transferred to them on June 8, 1921. They had no licence to sell excisable liquors, so that their customers, if they desired such liquors with their meals, had to send out for them. To avoid this inconvenience, their representative gave notice on January 3, 1922, of his intention to apply for a justices' licence authorizing the grant of an excise licence to sell by retail wine and beer for consumption, either on or off the premises. On March 3, 1922, the justices granted their licence authorizing the applicant to hold an excise licence to sell beer and wine by retail at the premises known as Stewart's Restaurant for consumption on the premises, subject to the conditions indorsed on the licence. These conditions were as follows: "No bar to be erected. Wine or beer to be sold only with bona fide meals. No wine or beer to be sold off the premises. The sum of 150*l.* as monopoly value to be paid to the Commissioners of Customs and Excise." In pursuance of this licence the representative of Callard, Stewart & Watt, Ld., obtained an excise licence dated October 1, 1922, authorizing him to carry on the trades of retailer of beer, retailer of wine, and dealer in tobacco, "he having paid for this licence, being an ordinary restaurant licence, the undermentioned duties." Justices' and excise licences had been obtained each year in the same terms and subject to the same conditions. The result was that since October 1, 1922, the customers of Callard, Stewart & Watt, Ld., while still obliged to send out if they required spirits, could obtain beer or wine with their meals without sending out for it. The restaurant was admittedly well conducted and caused no annoyance to any one.

Mr. Lorden brought the present action against Sir T. Brooke-Hitching (hereinafter called "the first defendant") and Messrs. Callard, Stewart & Watt, Ld. (hereinafter called "the second defendants"), alleging in his amended statement of claim (para. 3) that in breach of the said covenant in the sub-lease of June 11, 1920, without the consent of the plaintiff or the ground landlord, the trades or businesses of alehouse keeper, beerhouse keeper, tavern keeper, and/or licensed victualler had been since March 2, 1923, and were being carried on and exercised upon the said demised premises by the first defendant and/or by his sub-tenants or licensees, the second defendants; (para. 4) that the defendants threatened and intended that the said trades and businesses should continue to be carried on and exercised as aforesaid; and (para. 5) that by reason of the said breaches of covenant the value of the said premises had been diminished and the plaintiff had been injured in his reversion expectant upon the term of the said sub-lease. And the plaintiff claimed: (1.) an injunction; and (2.) damages.

The first defendant, Sir T. Brooke-Hitching, in his amended defence stated: (para. 2) that it was denied that in breach of any covenant of the said sub-lease he or his sub-tenants, or the second defendants, his licensees, had been since March 2, 1923, or were carrying on or exercising the trades or businesses of alehouse keeper, beerhouse keeper, tavern keeper, and/or licensed victualler on the demised premises; (para. 3) that he denied that he threatened and/or intended that the said alleged trades or any of them should continue to be carried on and exercised on the demised premises;

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(para. 4) that it was denied that the value of the premises had been diminished or that the plaintiff had been injured in his reversion expectant upon the said term; (para. 5) that by a licence by the competent licensing authority to the second defendants, licence was granted as from March 2, 1923, to sell beer and wine on the premises in their occupation subject to the conditions therein contained; (para. 6) that in compliance with the said licence and not otherwise the second defendants had as the plaintiff well knew since March 2, 1923, sold wine or beer on their said premises, and that such sale was not a breach of any of the covenants of the said sub-lease; and (para. 7) that if it should be held that the said sale was a carrying on of a trade or business for which the written consent of the plaintiff or of his ground landlord should first have been obtained, the plaintiff was not entitled to the injunction claimed, in that before the issue of the writ he knew that this defendant was prepared to do all things necessary to obtain such consent, wherefore such relief, if any, as the plaintiff was entitled to sounded in damages only.

The second defendants in their defence stated (inter alia) (para. 1) that by the agreement for the assignment of the premises assigned to them these defendants were precluded from requiring production of any superior lease or copy thereof, and until October 4, 1924, they had no knowledge of any of the contents of the said sub-lease; (para. 3) that these defendants denied that either in breach of the said covenant or otherwise the trades or businesses of alehouse keeper, beerhouse keeper, tavern keeper, and/or licensed victualler had been or were being carried on or exercised upon the premises by these defendants; (para. 4) that these defendants denied that they threatened and intended that the said trades and businesses or any of them should be carried on or exercised upon the said premises; (para. 5) that they did not admit that the value of the said premises had been diminished or the plaintiff had been injured in his reversionary interest in the premises; and (para. 6) alternatively that if these defendants were carrying on upon the premises any trade or business in breach of any such covenant the same had been carried on with the knowledge of the plaintiff, who was therefore precluded by his own delay, laches and acquiescence from obtaining the relief claimed, and whose right of action, if any, sounded in damages only.

Sir Leslie Scott K.C. and *G. R. Blanco White* for the plaintiff. The business carried on by the defendants upon the premises constitutes a breach of the covenant in clause 11 of the sub-lease of June 11, 1920. The covenant provides that the trade or business of (inter alia) an "alehouse keeper, beerhouse keeper, tavern keeper, licensed victualler," shall not be carried on upon the demised premises without consent. These expressions may be understood in their plain ordinary colloquial meaning. If they be so understood the business in question comes within them, because it is a business in the course of which victuals are sold, and which is licensed: *Reg.* v. *Surrey Justices* (1); and it is therefore carried on in contravention of the covenant. These expressions may also be understood in a technical sense as terms of legal art by reference to the Licensing Acts. The term "alehouse" was used in the Alehouse Act, 1828 (9 Geo. 4, c. 61), which was repealed by the Licensing (Consolidation) Act, 1910. The term "beerhouse" is used in the Beer Licenses Act, 1830, the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), and the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24). The term "licensed victualler" is equivalent to publican. This appears from the fact that the same licences which were granted to a licensed victualler are granted to a publican. The Finance (1909–10) Act, 1910, s. 51, sub-s. 1, provides that any reference in any Act or document to any description of excise licence which is expressed in the First Schedule to correspond to any description of licence which may be granted under the Act shall be deemed to be a reference to the description of licence to which it is expressed to correspond. Under the First Schedule, C, I, the on-licence which was taken out by licensed victuallers as retailers of spirits under the Inland Revenue Act, 1880, s. 43, sub-s. 1, is expressed to correspond to a spirit retailer's on-licence or publican's licence; and the licence which was taken out by licensed victuallers as retailers of beer or wine under the Act of 1880, s. 41, is expressed to correspond to the beerhouse licence which is taken out by publicans. The provisions of the sections as to victuallers' licences apply therefore to publicans' licences: see Paterson on Licensing, 36th ed., p. 288. The covenant in question may therefore be read as prohibiting the business of a beerhouse keeper, a licensed victualler or a publican. Now, the Beerhouse Act, 1830, s. 31, provides that any covenant in any lease whereby the trade or business of a victualler or publican is prohibited in any house, or whereby any house is prohibited from being used as a public house or alehouse, shall apply to every person licensed to sell beer or ale under that Act; and the Refreshment Houses Act, 1860, s. 44, provides that any covenant whereby the trade or business of a vintner is prohibited in any house, or whereby any such house is prohibited from being used as a public house shall apply to every person licensed to sell wine to be consumed on the premises. Further, by the Finance (1909–10) Act, 1910, s. 52, publican's licence means the on-licence to be taken out by a retailer of spirits, and beerhouse licence means the on-licence to be taken out by a retailer of beer. In view of these provisions the covenant in question may be read as prohibiting the business of a beerhouse keeper, a person licensed to sell beer or wine, or a retailer of beer. It is submitted that the business carried on by the defendants on the premises in question was that of a beerhouse keeper in the technical sense within the meaning of the covenant. At all events it was clearly the business of a person licensed to sell beer or wine, or the business of a retailer of beer within the purview of the covenant. It therefore constituted a breach of the covenant.

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(1) (1888) 52 J. P. 423.

The covenant is a negative covenant, and therefore, for a breach of it the Court has no discretion to give damages in lieu of an injunction, but is bound to grant an injunction:

Doherty v. *Allman* (1); *McEacharn* v. *Colton* (2); *Lord Manners* v. *Johnson* (3); and *Leech* v. *Schweder.* (4)

It is immaterial whether the second defendants, who were sub-lessees in occupation of the premises and carried on the business there, had or had not notice of the covenant in question in the superior lease: *Cosser* v. *Collinge* (5); *Lewis* v. *Bond* (6); *Feilden* v. *Slater* (7); and *Parker* v. *Whyte.* (8)

J. D. Cassels K.C. and *N. L. Macaskie* for the first defendant. The plaintiff is not entitled to the relief which he claims.

The business in question does not constitute a breach of the covenant prohibiting the carrying on upon the premises of any of the businesses of an "alehouse keeper, beerhouse keeper, tavern keeper, licensed victualler," so as to be a nuisance. If these expressions be understood in their ordinary sense they all refer to businesses in which intoxicating liquor may be sold practically without restriction, and this business does not come within them, because it is one in which such liquor can only be sold to persons having meals on the premises and subject to other conditions. The expressions may, however, be understood in a technical sense. An "alehouse" was a house licensed under the Alehouse Act, 1828, now repealed, for the sale of ale without restriction on or off the premises. A "beerhouse" was licensed under the Beerhouse Act, 1830, and subsequent Acts for the sale of beer without restriction. Under the Inland Revenue Act, 1880, s. 41, an excise licence could be obtained for the sale of beer in any quantity on or off the premises, and under s. 43, sub-s. 1, an excise licence could be obtained for the sale of spirits. It is not disputed that the expression "public house" is equivalent to alehouse or beerhouse, and means a house where intoxicating liquor is sold without restriction for consumption on or off the premises. By virtue of the Finance (1909–10) Act, 1910, ss. 43, 44, 51, sub-s. 1, and First Schedule, C, I, there is now substituted for the former excise licence for the sale of spirits under the Act of 1880, s. 43, sub-s. 1, the licence of a retailer of spirits or publican's licence for the sale of spirits without restriction; and there is now substituted for the former licence for the sale of beer on or off the premises under the Act of 1880, s. 41, the licence of a retailer of beer or beerhouse licence for the sale of beer without restriction. These are the excise licences applicable to fully licensed premises. "Tavern" is an ancient term denoting a fully licensed house where every kind of liquor can be had. It is a place where wine and ale are sold. It may be doubted whether "licensed victualler" was a term of legal art in 1920, when this covenant was entered into: see Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 13, and the note thereon in Paterson on Licensing, 27th ed., p. 250. It appears, however, from the former Licensing Act, 1872, ss. 12–24, that under that Act a licensed victualler required a full justices' licence, and he cannot now carry on business without a full justices' licence under the Licensing (Consolidation) Act, 1910, s. 14, and excise licences under the Finance (1909–10) Act, 1910, ss. 43, 44, 52, and First Schedule, C, I.

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(1) (1878) 3 App. Cas. 709, 719.

(2) [1902] A. C. 104.

(3) (1875) 1 Ch. D. 673.

(4) (1874) L. R. 9 Ch. 463, 465.

(5) (1832) 3 Myl. & K. 283.

(6) (1853) 18 Beav. 85.

(7) (1869) L. R. 7 Eq. 523.

(8) (1863) 1 H. & M. 167.

The business in question does not come within any of these expressions. It is the business of a restaurant, at which intoxicating liquor cannot be sold without restriction, but only to customers having bona fide meals and subject to other conditions. Businesses of that description are recognized in the Refreshment Houses Act, 1860. It appears from the former Licensing Act, 1872, ss. 12–29, that a justices' licence to a restaurant keeper was not a full but a limited licence. The Licensing (Consolidation) Act, 1910, s. 14, enables the justices to attach to such licences conditions, a breach of which constitutes an offence to be dealt with by a Court of summary jurisdiction. The excise licence for a restaurant has never been the same as that required for any of the four businesses mentioned in the covenant. It was formerly the licence for the sale of beer and wine by retail under s. 42 of the Act of 1880, which is not referred to in the Finance (1909–10) Act, 1910. It is now the licence in respect of which a reduced duty is payable under s. 45 of the last mentioned Act. The business of the defendants has a justices' licence under s. 14 of the Licensing (Consolidation) Act, 1910, and an excise licence under s. 45 of the Finance (1909–10) Act, 1910, and is the business of a restaurant keeper. As to s. 31 of the Beerhouse Act, 1830, and s. 44 of the Refreshment Houses Act, 1860, these sections refer only to covenants existing at the time of the passing of the respective Acts, and not to covenants entered into subsequently. A person may require a particular form of licence for his business, but it does not necessarily follow that he is carrying on the kind of business with which that form of licence is generally associated: *Duke of Devonshire* v. *Simmons.* (1) It appears from the cases that the covenant in question is not broken by such a business as is here carried on: *Holt & Co.* v. *Collyer* (2); *Stuart* v. *Diplock* (3); *London and North Western Ry. Co.* v. *Garnett* (4); *Jones* v. *Bone* (5); *Buckle* v. *Fredericks* (6); and *Fitz* v. *Iles.* (7) The case of *Reg.* v. *Surrey Justices* (8) is distinguishable, because there the restaurant had not a licence to sell beer, wine and spirits, but only to sell wine, and it could not therefore be said to be a victualling house.

Secondly, it is not true, except perhaps as a general proposition, to say that in such cases the Court declines to give damages instead of an injunction. This defendant will adopt the argument about to be advanced on this point on behalf of the second defendants.

Thirdly, this defendant does not dispute that an underlessee is bound by a covenant such as this in the superior lease whether he knows of it or not.

Jowitt K.C. and *H. H. King* for the second defendants. These defendants by carrying on their restaurant business upon the premises did not commit a breach of the covenant in the sub-lease of June 11, 1920, prohibiting the carrying on of the business of an alehouse keeper, beerhouse keeper, tavern keeper, licensed victualler, or any other trade or business which should be dangerous or a nuisance or annoyance to neighbouring tenants. They did not commit any breach of the covenant if the terms "alehouse keeper, beerhouse keeper, tavern keeper, licensed victualler" be construed in their technical sense. On this point these defendants adopt the argument which has been advanced on behalf of the first defendant. Neither did they commit a breach of the covenant if these terms be construed in their popular sense. Construed in that sense each of these terms denotes a fully licensed public house, while the business conducted by these defendants is that of a high class restaurant, and is only licensed as such. These terms occur in a very long covenant specifying a large number of trades and businesses, and according to the ejusdem generis rule they should be limited by the general words at the end of the covenant to trades and businesses which are dangerous or an annoyance to neighbouring tenants. The covenant occurs in a lease between persons who were in no way connected with the liquor trade.

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(1) (1894) 11 Times L. R. 52.
(2) (1881) 16 Ch. D. 718.
(3) (1889) 43 Ch. D. 343.
(4) (1869) L. R. 9 Eq. 26.
(5) (1870) L. R. 9 Eq. 674.
(6) (1890) 44 Ch. D. 244.
(7) [1893] 1 Ch. 77.
(8) 52 J. P. 423.

If the defendants' business is a breach of the covenant the plaintiffs are not entitled to an injunction. Ever since the passing of Lord Cairns' Act (21 & 22 Vict. c. 27) the Court has had express statutory power to award damages in substitution for an injunction. The Court has in every case a discretion to determine whether to award an injunction or damages, but there are certain principles which determine the exercise of its discretion. The Court will not grant an injunction where the object of the plaintiff is to obtain money: *Shelfer* v. *City of London Electric Lighting Co.* (1), per Lindley and A. L. Smith L.JJ. Here the correspondence between the parties shows that the object of the plaintiff is to get money, and he ought not therefore to be granted an injunction. Where the defendant is knowingly doing wrong the Court will grant an injunction and will not suffer him to continue his wrongdoing by paying damages for it: *Smith* v. *Smith* (2), per Jessel M.R. In the present

(1) [1895] 1 Ch. 287, 316, 322.

(2) (1875) L. R. 20 Eq. 500, 505.

case, however, these defendants were not doing wrong, for their business is not a breach of the covenant. In any case they were not knowingly doing wrong, because when they contracted for the assignment to them of their interest in the premises they were prevented by the Conveyancing Act, 1881, s. 3, sub-s. 1, from calling for the title to the leasehold reversion, and therefore could not know of the covenant in question, and no notice of that covenant had been given to them. Where the plaintiff's right against the defendant is not legal but merely equitable the Court will not award an injunction, but only damages: *Elliston* v. *Reacher* (1); *Sharp* v. *Harrison*. (2) Here these defendants were not bound to the plaintiff by any express covenant, but only, if at all, by an equitable covenant. If these defendants were now to assign their interest in the premises, the effect of the assignment would be that under the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 44, sub-ss. 3, 5, 8, the assignee would have no right to call for the title to the reversion, and would not be bound by this covenant. The Court ought not, therefore, to grant an injunction against these defendants, seeing that they might at any time assign their interest to another person against whom the injunction could not be enforced.

In the present case the plaintiff is not even entitled to damages. The defendants' business has not injuriously affected the premises, and it has not been a nuisance or annoyance to any one.

Blanco White replied.

SALTER J. This is an action by a landlord to enforce a covenant in the lease restricting the use of the demised premises. The question is whether the use of the premises as a restaurant with a beer and wine on-licence is a breach of a covenant not to use them for the trades of an alehouse keeper, beerhouse keeper, tavern keeper or licensed victualler. [His Lordship stated the facts substantially as above set out and continued as follows:] The Finance (1909–1910) Act,

(1) [1908] 2 Ch. 374, 395; affirmed Ibid., 665. (2) [1922] 1 Ch. 502, 514.

1910, s. 45, provides that where premises are adapted for a restaurant and are bona fide so used, and it is shown that the receipts from the sale of intoxicating liquor are less than a certain proportion of the total receipts, the licence duty payable shall be a reduced duty bearing the same proportion to the full duty as the receipts for the sale of intoxicating liquor bear to the total receipts. Under the provisions of this section these defendants have always paid a licence duty much less than the full duty. Before the Licensing (Consolidation) Act, 1910, the justices often imposed conditions in granting their licence, and, if such conditions were not observed, no doubt the renewal of the licence was imperilled, but the licence holder ran no other risk. Now, however, breaches of such conditions can be dealt with summarily. The justices have thus the power to grant a licence which is in effect useless except for a restaurant, and this power, coupled with the provision of a lower licence duty for restaurants, has, I think, created what may fairly be described (as it is described in the excise licence here) as a "Restaurant Licence." It is a licence more limited and less costly than a regular unconditional licence—a licence to sell drink, not as the main business of the licensee, but as ancillary to his main business.

The covenant is in a familiar form. The premises are not to be used, except with the permission of the lessor and the freeholder, as a place of public entertainment or for the carrying on of a long list of trades, among which are those of alehouse keeper, beerhouse keeper, tavern keeper and licensed victualler. The general words are: "or any other art trade business or employment whatsoever which shall be dangerous or a nuisance or annoyance to the tenant or occupier of any messuage suite flat or any other hereditament in the neighbourhood of the premises hereby demised." The object of the covenant is plainly to maintain the amenity of the neighbourhood and to prevent any annoyance to adjoining occupiers whether by noise, smell, dirt, dust, smoke, crowds or disorder. The parties have spared no pains to make it clear that this is their object, and to make it clear that this is their only object. The use of the demised premises for business purposes is contemplated. There is no prohibition of retail trade and none of the sale of excisable liquor.

The prohibition of each trade, or group of trades, must be read in the light of the general words which follow the enumeration. The language of the clause is popular and untechnical, and trades are separately mentioned which are very similar if not identical. The words relied on by the plaintiff are: "alehouse keeper beerhouse keeper tavern keeper licensed victualler." I think these words must be read, with the rest of the clause, in their ordinary and popular meaning. In *Holt & Co.* v. *Collyer* (1) the covenant was not to use the house as a public house, tavern or beerhouse. The tenant opened a grocer's shop and sold beer under an off-licence as ancillary to his grocer's business. Fry J. held there was no infringement of the covenant, and said: "Now is there anything here from which I can infer that the word 'beerhouse' was not used in its primary and popular sense? The covenant which the plaintiff desires to have enforced against the defendant is contained in an indenture of lease, which is not a trade instrument in any sense of the term. It is an ordinary lease by a landlord, who is not shown to be a brewer or connected with the brewing trade, to a person who was not, according to the plaintiff's own statement, connected with the business of selling beer at that time, and in respect of whom there is no evidence to show that he was engaged in any way in the business." If the words "alehouse keeper and beerhouse keeper" have, or had, any technical meaning, I think they mean persons who held licences under the Alehouse Act, 1828, and the Beerhouse Act, 1830, respectively. I think "tavern keeper" never was a technical term. A tavern has been held to be an inn, and the tavern keeper subject to the liabilities and entitled to the rights of an innkeeper: see the case of *Thompson* v. *Lacy*. (2) In this sense the defendants are certainly not tavern keepers. As to the popular sense of the words, I think that "alehouse," "beerhouse" and "tavern"

(1) 16 Ch. D. 718.

(2) (1820) 3 B. & Al. 283.

all imply a place where people can go and buy intoxicating drink and consume it without necessarily buying anything else. The words most relied on were "licensed victualler." These defendants are certainly victuallers in the sense that they sell victuals, and they are licensed both to keep their premises open as a refreshment house and to sell beer and wine there on conditions. It was admitted that the refreshment house licence did not make them licensed victuallers within this covenant, but it was submitted that the beer and wine licence did. In my opinion they are not licensed victuallers within the meaning of this covenant, either in a technical or a popular sense. In so far as these words ever had a technical meaning, they applied to a person who held a victualler's licence under the Alehouse Act of 1828. The corresponding modern licence is the publican's full on-licence. In *Rex* v. *Surrey Justices* (1) a confectioner who held a wine licence and supplied luncheons obtained, without any condition, a justices' licence to hold a full on and off excise licence. The question was whether he was a person about to keep a victualling house within 9 Geo. 4, c. 61, s. 1. In dealing with this question Wills J. refers to the expression "licensed victualler," and says: "The applicant came clearly within the description of a victualler, and when he got his licence he became a licensed victualler, the name usually given to those who hold this general licence." In ordinary and colloquial language a licensed victualler means a publican, one who keeps a place where people can go to drink and for no other purpose. In *Pease* v. *Coats* (2) the covenant was not to carry on certain offensive trades or any business which was or might be deemed a public or private nuisance, nor to use any building "as a public house for the sale of beer, wine, malt liquors, or spirits." It was held to be no breach to sell beer by retail under an off-licence. Sir W. Page Wood V.-C. said, among other grounds of his judgment: "Further than this, the covenant is directed against nuisances of a local character, arising from offensive smells, and the noise and disturbance that would be occasioned

(1) 52 J. P. 423, 424.

(2) (1866) L. R. 2 Eq. 688, 691.

by a parcel of tipplers congregating about any of the houses or the property. I cannot, therefore, hold the sale of beer under a licence not to be drunk on the premises to be within the restriction contained in the covenant." It must be admitted that the reading of the covenant which I have adopted gives much the same meaning to the terms "alehouse keeper" and "licensed victualler," but I feel no difficulty about this, having regard to the terms in which the other prohibited trades are enumerated. In *Stuart* v. *Diplock* (1) the covenant was not to permit the business of ladies' outfitting. The defendants carried on business as hosiers and sold articles, the sale of which was usual with hosiers and was also part of the business of ladies' outfitters. It was held that there was no breach of the covenant. So, here, these defendants sell wine and beer, and licensed victuallers sell wine and beer, but this does not of itself make the defendants licensed victuallers. In *Duke of Devonshire* v. *Simmons* (2) the covenant was not to "use the premises as a public house or beershop, or for carrying on any offensive trade or business whatsoever." The defendant kept a private hotel, and in order to save her customers inconvenience, she obtained from the justices a full on-licence subject to an undertaking to have no public bar and to supply only visitors to the hotel. At the hearing she further undertook not to sell beer. Stirling J., in refusing an injunction, relied on the limited and conditional character of the licence and on the Inland Revenue Act, 1880, s. 43, sub-s. 4, which provided for lower licence duty in the case of premises structurally adapted for use as an hotel and mainly so used. This section is very similar to s. 45, sub-s. 1, of the Finance (1909–1910) Act, 1910, which is above referred to. So far as decided cases can afford any guide to the construction of a document, the authorities seem to me to support the view of this covenant which I have expressed.

It was, however, urged that, whatever view I might take of the intention of the parties as expressed in these words, I was bound to hold that the second defendants were carrying

(1) 43 Ch. D. 343. (2) 11 Times L. R. 52.

on one or other of these four prohibited trades by reason of the provisions of the Beerhouse Act, 1830, s. 31, and the Refreshment Houses Act, 1860, s. 44. The former section provides that restrictive covenants in any lease or contract between landlord and tenant whereby the trade of victualler or publican is prohibited or a place is prohibited from being used as a public house or alehouse shall apply and extend, and shall be construed to apply and extend, to persons and places licensed under that Act. When this section was enacted Parliament was creating a new form of licensed house. There were in existence many covenants between landlord and tenant referring in various terms to licensed persons and places as theretofore existing and, in the absence of some such enactment, it would have been difficult to say whether the parties had covered by their language a form of licence which they could not then foresee. No such difficulty arises in regard to covenants made after the Act had passed. If the section is to be applied to such covenants it must be read subject to a condition that the parties have not expressed a contrary intention. That is, it must be read with one meaning as applied to then existing covenants and with another meaning as applied to subsequent covenants. In my opinion the section applies only to covenants existing at the time of the passing of the Act. Similar observations apply to s. 44 of the Refreshment Houses Act, 1860. I think there is nothing in either section to prevent me from gathering the intention of the parties from the words they have used.

The alleged breach of this covenant has not been proved, and there must be judgment for both defendants, with costs.

Judgment for defendants.

Solicitor for plaintiff: *W. H. Bellamy.*

Solicitors for first defendant: *Stanley Evans & Co.*

Solicitors for second defendants: *Richardson, Sadlers & Callard.*

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Feb. 16, 17, 18, 21; *March* 10.

[IN THE COURT OF APPEAL.]

JEBARA *v.* OTTOMAN BANK.

[1922. J. 1004.]

Sale of Goods—Effect of War on executory Contract—Seller's Agents delivering Goods to enemy Buyers—Conversion—Agency of Necessity—Treaty of Lausanne, 1923, *art.* 84—*Treaty of Peace* (*Turkey*) *Act*, 1924 (14 *Geo.* 5, *c.* 7)—*Treaty of Peace* (*Turkey*) *Order*, 1924.

The respondent, J., a British subject, had for many years been in the habit of consigning Manchester goods to customers in Beyrout. The course of business was for him to draw a bill at sight for the amount in sterling representing the cost of the goods and commission, hand it, with the bills of lading and invoices, to the Manchester branch of the O. Bank (the appellants), who made an advance to him and then sent the documents to their Beyrout branch, who collected the price from the customers in exchange for the goods. On the Manchester branch being advised by the Beyrout branch that the price had been paid, a cheque for the sterling value of the bills, less any advance made, was handed to the respondent. In accordance with this practice, the respondent consigned to Beyrout goods which arrived there shortly before the outbreak, on November 5, 1914, of war between this country and Turkey, on which date the appellants held the bills and the documents representing the goods. The bills were in the following form: "Please pay to our order value cheque on London the sum of £ sterling. Shipping documents attached to be given up upon payment." After the outbreak of war the appellants delivered the goods to the customers, taking payment in piastres, and at the conclusion of the war claimed that they were only liable to pay the respondent an amount in sterling which at the then current rate of exchange represented the value of the piastres they had received for the goods. The respondent sued the appellants to recover the sterling amount of the bills, or, alternatively, the value of the goods or damages for their conversion. Rowlatt J. gave judgment in his favour for the sterling amount of the bills:—

Held, by the Court of Appeal, varying the decision of Rowlatt J., (1.) that the contractual relations between the respondent and his customers and between him and the appellants, being still executory at the outbreak of war, became thereupon dissolved, and, consequently, that the appellants had no longer any right to deal with the goods under their mandate; (2.) that the appellants having parted with the goods after their mandate had ceased to exist, and not being agents of necessity, or protected by the provisions of art. 84 of the Treaty of Lausanne, 1923 (to which full force and effect was given by the Treaty of Peace (Turkey) Act, 1924, and the Treaty of Peace (Turkey) Order, 1924), were guilty of conversion and were liable in damages.

Observations by Scrutton L.J. on the limits of the doctrine of agency of necessity.

Art. 84 of the Treaty of Lausanne, which provides (inter alia) that "where payments to be made under a pre-war contract are represented by sums collected during the war, in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected, in the currency in which they were collected," has no application, where, e.g., Turkish subjects, without contractual obligation or right, part with an English subject's goods in exchange for a sum in piastres. In so doing the Turkish subjects cannot be said to have "collected" the money for the English subject's goods.

APPEAL from a decision of Rowlatt J.

The plaintiff, a British subject, who carried on business in Manchester, had for many years been in the habit of purchasing Manchester goods and consigning them to customers in Turkey. His practice was to draw a bill at sight for the amount in sterling representing the cost of the goods, plus his commission, then hand it, with the bills of lading and invoices attached, to the Manchester branch of the defendant bank, who made an advance to him, and then sent the documents to their branch in Beyrout, who collected the price in piastres from the customer in exchange for the goods and credited the Manchester branch in their books in sterling with the face value of the bills. When the Manchester branch was advised by the Beyrout branch that the price had been paid, a cheque for the amount indicated on the face of the bill in sterling as the price of the goods, less the amount of any advance made if it had not previously been repaid, was handed to the plaintiff. In accordance with this practice the plaintiff consigned a large quantity of goods for customers at Beyrout, which arrived there shortly before the outbreak of war between this country and Turkey on November 5, 1914, on which date the defendants held a number of bills and the documents representing the goods. The bills were in this form: "Please pay to our order value cheque on London the sum of £ sterling. Shipping documents attached to be given up upon payment." After the outbreak of war the defendants delivered the goods on various dates to the customers, taking payment in piastres. At the conclusion of the war the defendants claimed the right to pay to the plaintiff an amount in sterling which at the then current rate of exchange represented the value of the piastres they had received in payment for the goods. As, owing to the depreciation in the Turkish currency, this represented a serious loss to him, the plaintiff declined to accept it and claimed to be paid the sterling amount of the bills. He accordingly sued to recover the amount of the bills in sterling, or, alternatively, the value of the goods or damages for their conversion.

The defendants denied that they had received money in sterling in respect of the goods. They relied on the fact of the outbreak of war and certain provisions of Turkish law as making the agreement between the parties illegal or impossible of performance. They contended that they became agents of necessity in relation to dealing with the documents and goods, and that their Beyrout branch had exercised due care and taken the only reasonable course in acting as they had done in collecting from the drawees of the bills as and when they were able the equivalents of the amounts thereof at the legal rate of exchange in Turkey. The defendants further relied upon art. 84 of the Treaty of Lausanne, to which full force and effect was given by the Treaty of Peace (Turkey) Act, 1924, and the Treaty of Peace (Turkey) Order, 1924. Art. 84 was in these terms: "The High Contracting Parties are in agreement in recognising that debts which were payable before the war or which became payable during the war under contracts entered into before the war, and which remained unpaid owing to the war, must be settled and paid, in accordance with the provisions of the contracts, in the currency agreed upon, at the rate current in its country of origin. Without prejudice to the provisions of the Annex to Section II. of this Part, it is agreed that where payments to be made under a pre-war contract are represented by sums collected during the war, in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected, in the currency in which they were collected. . . . ."

Rowlatt J. took the view that the defendants' branch in Beyrout had during the war accepted piastres as the equivalent of sterling, and although the transaction could not be completed by a transfer and adjustment as between Beyrout and Manchester, the defendants were nevertheless bound to account to the plaintiff for the amount of the bills in sterling. He further held that art. 84 of the Treaty of Lausanne had no application, as no sum had been collected in a currency other than sterling. He accordingly gave judgment in favour of the plaintiff for 4366*l*. 10*s*. 5*d*., being the amount of the bills—3161*l*. 6*s*. 6*d*.—and interest, 1205*l*. 3*s*. 11*d*.

The defendants appealed.

Sir John Simon K.C., *The Hon. Geoffrey Lawrence K.C.* and *Somervell* for the appellants. Rowlatt J. was wrong in holding that the appellants were liable to the respondent for the sum of 3161*l*. 6*s*. 6*d*. as money had and received to the use of the respondent. The appellants never received that sum. They received Turkish piastres which they offered in August, 1919, to remit to the respondent, but their offer was ignored. From November 5, 1914, the date of the declaration of war with Turkey, until January, 1919, all correspondence between Manchester and Beyrout became impossible, and a draft on London could not be procured in Beyrout, so the Beyrout branch found themselves in possession of a sum in piastres which they could not remit to the respondent. Before the war 100 piastres went to the Turkish pound and a cheque on London for 1*l*. could be obtained for 110 piastres; during the war the value of the piastre declined, and after the war 1*l*. was the equivalent of 550 piastres. The question is who is to bear the loss. The appellants contend that they have performed their obligation to the respondent by crediting him with piastres which they were unable to remit to him, and that the rise or fall in value of the sum of piastres with which they credited him does not concern them but ought to be borne by him. The respondent insists that he is entitled to the value of his piastres as on a date before the war, and Rowlatt J. has treated the appellants as having procured a cheque on London and refusing to hand it over, when in fact it was impossible to procure a cheque on London. As agents of necessity the appellants were only bound to act reasonably.

Secondly, this case falls within art. 84 of the Treaty of Lausanne, which was carried into effect by the Treaty of Peace (Turkey) Act, 1924 (14 Geo. 5, c. 7), and the Treaty of Peace (Turkey) Order, 1924, made thereunder. That article provides (para. 2) that where payments to be made under a pre-war contract are represented by sums collected during the war in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected in the currency in which they were collected.

Cyril Atkinson K.C. and *Sir Cassie Holden* for the respondent. Rowlatt J. was right in holding that the respondent was entitled to the face value of the bills in question. The appellants were only entitled to release the goods in exchange for a cheque on London. The long standing practice as between the appellants' Beyrout branch and the respondent's customers involved, in substance, a purchase by those customers from the branch of a cheque on London, and the appellants having dealt on this basis must account for the amount in sterling. This view is borne out by the fact that the Beyrout branch credited in their books the appellants' Manchester branch with the sterling amount of the bills. The fact that war broke out between Great Britain and Turkey does not affect the respondent's right to get back, after the war, his property or its value if it was disposed of: see per Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (1), and therefore the appellants must account for it. See also *Tingley* v. *Müller* (2) and *Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen Industrie.* (3)

If the appellants are not liable on the contract they are clearly liable in conversion.

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(1) [1916] 2 A. C. 307, 347.
(2) [1917] 2 Ch. 144, 156.
(3) [1918] A. C. 239, 244, 245.

Art. 84 of the Lausanne Treaty does not assist the appellants, as there was no collection in a currency other than that required by the contract. The appellants collected in sterling.

Sir John Simon K.C. in reply.

[BANKES L.J. If the true position is that on the outbreak of war the contract between the parties was dissolved, what is the liability of the appellants, they having parted with the goods ?]

The appellants acted rightly and in accordance with their mandate in giving over in Turkey the goods in question in return for so many piastres.

[BANKES L.J. What right had the customers to demand the goods when the contract with them was dissolved by the outbreak of war ?]

The appellants did the best they could with the goods and did not become answerable for more than the goods realized. The appellants as agents of necessity acted reasonably in disposing of the goods in the way they did. This was the view taken by Greer J. in *Ananiadi* v. *Ottoman Bank* (1), where the circumstances were very similar.

[SCRUTTON L.J., on the question of agency of necessity, referred to *Nicholson* v. *Chapman* (2) ; *Gwilliam* v. *Twist* (3) ; and *Prager* v. *Blatspiel, Stamp & Heacock.* (4)]

The appellants were not bound to keep the goods during the whole period of the war, however long it might continue. They were gratuitous bailees, and what they did was consistent with the exercise of a proper degree of care.

[He referred to 1 Sm. L. C. (12th ed.) 208, 209.]

Further, art. 84 of the Treaty of Lausanne was designed to meet such a case as this. The appellants collected from the drawees the only currency which was lawful, and the number of piastres collected represented the amount of sterling named in the pre-war contract.

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(1) Unreported. Decided March 12, 1923.

(2) (1793) 2 H. Bl. 254.

(3) [1895] 2 Q. B. 84.

(4) [1924] 1 K. B. 566.

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[*Maridort* v. *Behrens* (1) and *Wenner* v. *Engelhardt* (2) were also referred to.]

Cur. adv. vult.

March 10. The following judgments were read :—

Bankes L.J. This is an appeal by the bank from a judgment of Rowlatt J. in favour of the plaintiff (the respondent) for a sum of 4366*l.* 10*s.* 5*d.*

The plaintiff carries on business in Manchester. For many years he has been in the habit of purchasing Manchester goods, and consigning them to customers in Turkey. There was no evidence indicating what the exact relations between himself and his Turkish customers were, and it is not possible to say whether, as between himself and them, he was a mere agent with a lien on the goods for his outlay, or whether he was a purchaser reselling the goods to them. It was proved that he paid for the goods, and the course of business as between himself and the bank was that he drew a bill at sight for the amount in sterling representing the cost of the goods, plus his commission. He then entrusted the bill with the bills of lading with invoices attached, to the Manchester branch of the defendant bank (the appellants), who made the plaintiff an advance on the goods, and then sent the documents to their branch in Turkey, who collected the price from the customer in exchange for the goods. The bank in Manchester having received from their Turkish branch advice that the price had been paid, and that they had been credited in account by their Turkish branch for the full face value of the bill, drew their cheque in favour of the plaintiff for the amount indicated on the face of the bill in sterling as being the price of the goods. The way in which the branch of the bank in Turkey carried through their part of the business was to calculate the number of piastres necessary to make up the sterling price of the goods, and to demand and receive from the customer that number of piastres when he took delivery of the goods. So long as the business followed its usual course the risk of exchange, such as it was, fell upon the bank, and what the plaintiff expected to receive, and did receive, was the cheque of the Manchester branch of the defendant bank for the full amount in sterling appearing upon the face of the sight bill. It was the outbreak of war between this country and Turkey which caused the trouble. War was declared on November 5, 1914. At that date the bank held a number of bills at sight, and the documents representing goods which had been entrusted by the plaintiff to the bank over the first seven months of that year, and which had arrived at Beyrout before the outbreak of war, and had not been delivered to the customers, but were in the warehouse of the branch at Beyrout ready for delivery. What the branch at Beyrout did with the goods was to deliver them to the customers as and when they demanded delivery, taking payment in piastres, either gold or paper, according to whichever was legal tender at the time. The rate of exchange adopted in order to arrive at the number of piastres payable by the customer was necessarily a purely arbitrary one. At the conclusion of the war the bank claimed the right to pay over to the plaintiff an amount in sterling, which at the then current rate of exchange represented the value of the gold and paper piastres which they had received in payment for the goods. Owing to the depreciation in the Turkish currency this represented a serious loss to the plaintiff, and he commenced this action claiming to be entitled to be paid the sterling amounts of the bills at sight which he had entrusted to the bank in the circumstances hereinbefore mentioned. His claim was formulated as a claim for a liquidated amount, or, alternatively, as a claim for damages for conversion.

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(1) (1921) 1 Recueil des Décisions des Tribunaux Arbitraux Mixtes 581.

(2) (1923) 3 Recueil des Décisions des Tribunaux Arbitraux Mixtes 760.

In the Court below the arguments appear to have proceeded mainly upon the first head of claim, and the case presented was founded upon the peculiar form in which the bills at sight were drawn—namely: "Please pay to our order value cheque on London the sum of £ sterling. Shipping documents attached to be given up upon payment."

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An elaborate argument was addressed to this Court, and doubtless to the Court below, as to the meaning to be given to the words "value cheque on London," and as to the obligations attaching to the person presenting such a bill. It was urged that nothing short of the receipt of a cheque on London in exchange for the goods or the shipping documents would discharge that obligation. The cheque, it was said, might be that of the customer himself, or of some one having an account in London whose cheque the customer could procure, or the cheque of the branch of the defendant bank purchased by the customer for the purpose. It is not necessary in my opinion to decide what in strictness the obligation is; but having regard to the long course of business between the plaintiff and the bank, in which the only cheque ever tendered to the plaintiff was the cheque of the Manchester branch, I question very much whether the plaintiff would have been satisfied with the cheque of any one else.

The argument for the plaintiff then proceeded to suggest that the course of business between the Beyrout branch and the plaintiff's customers amounted in substance, though perhaps not in form, to a purchase by the customer from the Beyrout branch of a cheque on London; and that as the bank had thus received a cheque on London, they must account for it at its face value. I cannot draw the suggested inference from the facts. There is nothing in my opinion which warrants a conclusion that the dealings between the Beyrout branch and the plaintiff's customers there were anything other than what, on the face of them, they appear to be—namely, a release of the goods by the Beyrout branch to the customers on payment by them to the branch of the amount of piastres which the bank demanded as the price of the goods.

Much reliance was placed by the respondent's counsel on the fact that in accordance with pre-war practice the Beyrout branch, after receipt of the customer's piastres, credited the Manchester branch in their books in sterling with the face value of the sight bills. I fail to see the importance of this fact. It was a matter of internal arrangement between the two branches of the bank. In normal times when communicated by the Beyrout branch to the Manchester branch it was an intimation by Beyrout to Manchester that Manchester could send their cheque to the plaintiff for the face value of the sight bills. The plaintiff knew nothing of the course of business between the two branches. In war time, when the one branch could not communicate with the other, the entries in the books of the Beyrout branch are, in my opinion, for the purposes of this case, of no value whatever. Had the result of this appeal depended upon whether I agreed with the reasons given for his judgment by the learned judge I should have felt bound to allow the appeal.

There is, however, one aspect of the case which does not seem to have impressed the learned judge, but which appears to me to be decisive, and that is the effect of the outbreak of war between this country and Turkey upon the contractual relations between the plaintiff and his customers in Turkey, and between the plaintiff and the Ottoman Bank. The contracts in each case were executory. As between the plaintiff and his customers the goods were undelivered, and unpaid for. As between the plaintiff and the bank the goods were in the custody of the bank at Beyrout, the mandate to deliver them to the plaintiff's customers in Turkey and to collect the face value of the sight bills was unperformed. In these circumstances I cannot doubt that the effect of the outbreak of war upon both sets of contracts was to dissolve them. From that moment the plaintiff's customers ceased to have any right to demand delivery of the goods, and the Beyrout branch could no longer claim to act under the mandate. What is the result of this state of things in the events which happened? Simply this, that unless the bank can justify the action of their Beyrout branch in parting with the goods on some ground other than that they were acting upon a mandate which had ceased to exist, the bank have, by the action of their Beyrout branch, been guilty of a conversion of the plaintiff's goods for which they must be held liable in damages.

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A case was made upon the pleadings, and was apparently relied upon in the Court below, as it was in this Court, that the Beyrout branch became under the conditions in which they found themselves agents of necessity, and that what they did in reference to the goods was, in the circumstances, reasonable and justifiable. It does not seem necessary to discuss the somewhat difficult question of what circumstances create an agency of necessity. The matter was considered by Greer J. in his judgment in *Ananiadi* v. *Ottoman Bank* (1), to which reference has been made. It was considered also by McCardie J. in *Prager* v. *Blatspiel, Stamp & Heacock.* (2) I am content to dispose of this part of the bank's case on one or both of two grounds. In the first place, the Beyrout branch never purported to act as agents of necessity. The branch treated the bills at sight as representing subsisting contracts. They received payment of them. They parted with the goods to the plaintiff's customers because, apparently, they considered that they were entitled to them. The question whether they could do better by keeping the goods, or whether they could get a better price for them, does not appear to have been considered by the bank officials at the time the goods were handed over, or at any other time. In the second place, I think that the evidence given at the trial wholly fails to establish the alleged necessity.

There remains yet one question to be considered to which the appellants attached great importance, and that is as to the construction and effect of art. 84 of the Treaty of Lausanne, which is in these terms: "The High Contracting Parties are in agreement in recognising that debts which were payable before the war or which became payable during the war under contracts entered into before the war, and which remain unpaid owing to the war, must be settled and paid, in accordance with the provisions of the contracts, in the currency agreed upon, at the rate current in its country of origin. Without prejudice to the provisions of the Annex to Section II. of this Part, it is agreed that where payments

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(1) Unreported. Decided March 12, 1923. (2) [1924] 1 K. B. 566.

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to be made under a pre-war contract are represented by sums collected during the war in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected, in the currency in which they were collected. This provision shall not affect settlements inconsistent with the foregoing provisions arrived at by voluntary agreement between the parties before the coming into force of the present Treaty." Whatever the framers of that article may have intended to cover by the second clause, I do not consider that the language is comprehensive enough to cover a case like the present, where the Turkish subject has, without either contractual obligation or right, parted with the English subject's goods in exchange for a sum in piastres which the Turkish subject expressed himself willing to take for them. The clause would no doubt apply in the case of a sterling contract where a Turkish subject, acting as agent for a British subject, had parted with the latter's goods in Turkey on an agreed and authorized credit, and the period of credit had not expired at the outbreak of war. In such a case the Turkish subject could claim that he could only collect the contract price as, and when, he did. In my opinion it does not lie in the mouth of a Turkish subject who converts a British subject's goods and receives money for them, to talk about "collecting" that money. "Collecting" appears to me to be an appropriate expression to use of an agent who is acting under a mandate, but wholly inappropriate where the agent takes moneys for a former principal's goods which he has no right either to demand or to receive.

For these reasons the appeal, in my opinion, fails. As the plaintiff's remedy, in the view I take, sounds in damages, unless the parties are prepared to agree the amount for which the judgment shall be entered, judgment must be entered for the respondent, with costs, for damages to be assessed by an official referee unless the parties agree on a special referee. The respondent must have the costs of the appeal, and the costs of any inquiry of damages will be in the discretion of the person taking the inquiry.

SCRUTTON L.J. This appeal raises questions of some difficulty as to the effects of war on a valid pre-war contract, questions not made easier by the scarcity of information on some questions of fact.

Mr. Jebara, a British subject resident in Manchester, was in the habit of procuring, to use a neutral word, Manchester goods for certain Turkish firms residing in Beyrout, then part of the Turkish Empire. There is no evidence to show whether he bought the goods so that the property passed to him, or whether the property passed at once to the Turkish firms. He certainly paid for the goods to the Manchester merchants; drew at sight for the price on the Turkish merchants; attached to the bill the bills of lading for the goods, as to which we are not told who were described as shippers, or what indorsements were on them; and financed himself by obtaining an advance on the documentary bill from the Ottoman Bank, whose headquarters were in Turkey, through its branch in Manchester. The Manchester branch would then forward the bill to their Beyrout branch, who would surrender the documents against payment by the Beyrout merchants. It is not clear whether Jebara bought so that the property passed to him, and passed the property to the Beyrout merchants against payment, or whether he secured himself for his commission and advances by exercising a lien on the documents and goods they represented for his advances. The bank certainly had a lien on the documents and goods for their advances.

The action is by Jebara against the Ottoman Bank, amongst other things, for wrongful dealing after the war broke out between England and Turkey on November 5, 1914, with goods and bills they received before the war.

The first question is what was the original obligation of the Ottoman Bank to Jebara in respect to the bills they undertook to collect for him. The bills are in an unusual home-made form, though they had been used in a course of business for some time. The bank paid so little attention to the wording that during nearly the whole of the action they were under the impression that the wording was quite

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different from the reality. The material words were "Please pay to our order value cheque on London the sum of" (say) "160*l*. sterling. Shipping documents attached to be given up upon payment to Candour Frères, Beyrout." What always happened in Manchester was that the Manchester bank having collected, gave Jebara, who did not bank with them, a cheque in sterling for the amount of the bill less advances and commission. He had nothing to do with the exchange, and did not suffer from the risks; his cheque was in sterling, derived from the sterling amount of the bill. What happened in Beyrout was that the Beyrout branch of the bank received from the consignee Turkish money in coin, enough at the rate of exchange of the day to provide the necessary amount in sterling in London. Whether the legal effect of this was that the consignee bought from the bank exchange on London representing a cheque on London in sterling, which he then gave to the bank in order to get the goods, or whether it was that the bank on account of Jebara was receiving piastres enough to produce the necessary cheque on London, it is not necessary to determine. I am satisfied from the course of business that the odd words on the bill were interpreted by the parties to mean that Jebara was to receive a cheque in sterling based on the sterling amount of the bill, and that he took no risk of exchange. It was the bank's business not to part with the documents unless they were prepared to pay such a sterling cheque; they took the risk of exchange.

The series of bills in question in the action are dated between January 30, 1914, and July 27, 1914, all before the outbreak of the European War, one in January, two in February, four in March, two in April, three in May, two in June, and five in July. The goods represented all seem to have arrived in Beyrout before the outbreak of war with Turkey. For some reason not explained in the evidence the consignees did not purport to pay for them to the bank till very much later, two in November, 1914, seven in 1915, of which four were in November and December, seven in 1916, and three in 1917, the last date being on June 27, 1917. During the later years the price of Manchester goods had gone up enormously, but the consignees only paid the price on the bills, at first in Turkish coin, but when the paper currency was introduced, in Turkish paper. Of course the bank could not remit to England after the war broke out, and the dispute in this action started when at the end of the war the bank proposed to pay Jebara sterling for the paper piastres they held at the then rate of exchange, which would mean a very heavy loss to him.

The original contract before the war being between an English subject resident in England and a Turkish subject resident in Turkey, involving the transfer of goods to the Turkish subject and the payment of money to the English subject, was at the outbreak of war between England and Turkey still executory, neither goods nor money had passed. In my view, in the language of Willes J. in *Esposito* v. *Bowden* (1), the effect of the outbreak of war "is to dissolve the contract, and to absolve both parties from further performance of it," both by English and Turkish law. I need not refer to the numerous authorities in the House of Lords on the effect of war on the contract for sale of goods even where it contained suspensory clauses. It is enough to cite Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (2), where he says: "The proposition of law on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial.' As to this I agree with the judgment of the Court of Appeal in the case of *Robson* v. *Premier Oil and Pipe Line Co.* (3), where Pickford L.J., delivering the judgment of the Court,

(1) (1857) 7 E. & B. 763, 783.
(2) [1918] A. C. 260, 267.
(3) [1915] 2 Ch. 124, 136.

Lord Cozens-Hardy M.R., himself and Warrington L.J., said: 'The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction.' That so expressed it is an incontrovertible proposition admits, I think, upon the authorities, of no doubt."

The Englishman could not deliver goods to the enemy of England, nor could the Turk pay money to the enemy of Turkey. There could be no commercial intercourse between them. And with the contract of sale went the subsidiary contract of agency. The Ottoman Bank, a Turkish subject, could not remain in contractual relations with a British subject in carrying out a void contract of sale. It was illegal for it to benefit the Turk, or to remit to the Englishman. The Proclamation of January 7, 1915, superseding an earlier proclamation, and the licence to the Ottoman Bank of November 30, 1914, fully support this view. The latter runs: "I hereby permit the Imperial Ottoman Bank to carry on banking business at all their establishments situated within the United Kingdom, subject to the following limitations, conditions and supervision: (1.) No transactions shall take place, directly or indirectly, with the establishments of the said banks situated in enemy territory, or with any persons resident in enemy territory." The result in my view was, that on November 4, 1914, the contract of Jebara with the Turkish consignees, and his contract with the Ottoman Bank as to action by them in Syria became null and void as involving intercourse with the enemy. The bank, however, did not take this view, and for some years after the outbreak of war continued to hand the goods to the consignees, and receive payment in piastres which they could not remit to England. I do not understand how, after two or three years' delay, the consignees were entitled to claim the goods. But, at any rate, I am satisfied that so far as the original contract of sale and employment were concerned, they were made invalid by the outbreak of war, and the bank could not rely on them as justification for their action. Unless, therefore, they could justify handing over the goods in some other way, they were liable for such handing over as a conversion.

It was argued that if the original contracts were void on the outbreak of war, the bank became agents of necessity and could justify their action in that way. I am not sure that it is not an answer to say that they never thought of themselves in that light, or considered whether it was necessary to act; they thought they were carrying out their contracts. But considerable difficulties arise on the question of agent of necessity in English law. Until recently it was treated as limited to certain classes of agents of whom masters of ships were the most prominent. High authorities had doubted whether it could be extended. I refer to the observations of Lord Esher M.R. in *Gwilliam* v. *Twist* (1); to the judgment of Parke B. in *Hawtayne* v. *Bourne* (2), but especially to the careful judgment of Eyre C.J. in *Nicholson* v. *Chapman.* (3) Many of the authorities are collected in a recent judgment of McCardie J. in *Prager's case*. (4) He there finds the facts so as not to raise any question of action by an agent of necessity, but discusses what the law would be, if he had found the facts differently. He takes the view that judges should expand the common law to meet the needs of expanding society, and proceeds to expand the doctrine of agent of necessity without clearly defining the limits, if any, of its expansion. The difficulty may be seen by considering the case of the finder of perishable goods or chattels which need expenditure to preserve them. If the finder incurs such expenditure, can he recover it from the true owner when he finds him, as his "agent of necessity"? Eyre C.J. raises this difficulty in the case above cited, and cites *Binstead* v. *Buck* (5), the case of the pointer dog. The pointer dog was

(1) [1895] 2 Q. B. 84.
(2) (1841) 7 M. & W. 595, 599.
(3) 2 H. Bl. 254, 257.
(4) [1924] 1 K. B. 566.
(5) (1777) 2 W. Bl. 1117.

lost, and his finder fed him for twenty weeks, and claimed the cost from his owner when he appeared, but the claim was treated as unarguable. The expansion desired by McCardie J. becomes less difficult when the agent of necessity develops from an original and subsisting agency, and only applies itself to unforeseen events not provided for in the original contract, which is usually the case where a ship-master is agent of necessity. But the position seems quite different when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals, and still more difficult when there is a pre-existing agency, but it has become illegal and void by reason of war, and the same reason will apply to invalidate any implied agency of necessity. How can one imply a duty in an enemy to protect the property of his enemy ? Will he not be violating his duty to his own country if he takes active steps to preserve an enemy's property ? I do not feel strong enough to expand the common law to this extent, and I do not see that McCardie J. has considered the effect of illegality and invalidity by reason of war in his doctrine. The principal in *Prager's* case (1) was a Roumanian, and Roumania was an ally of England, though it may be that the principal was in a part of Roumania occupied by the Germans, and was therefore to be treated as an enemy. Compare *Société Anonyme Belge des Mines d'Aljustrel (Portugal)* v. *Anglo-Belgian Agency.* (2) The decision of Greer J. in *Ananiadi* v. *Ottoman Bank* (3), to which we were referred, gives more trouble. It is not very clear how the goods in question in that case got to Turkey, but apparently before the war they had got into the hands of the Ottoman Bank at Constantinople as bankers for reward, though the bank there did not know for whom they were acting, and the question who put the goods in bailment with the Ottoman Bank is left in doubt. Then came the war, and the first part of the judgment of Greer J., with which I agree, is that the war invalidated all obligations of the Turkish bank to the English enemy. The bank had not

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(1) [1924] 1 K. B. 566.
(2) [1915] 2 Ch. 409.
(3) Unreported. Decided March 12, 1923.

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advanced any money on the security of the documents or goods. But having held that the bank were under no obligation as to the goods the learned judge says : " Now they (the bank) were in a position in which they were bound to do something, otherwise the goods would be entirely lost . . . and therefore they were in a position of agents of necessity." I do not follow the reasoning ; if all prior obligations were invalidated by the outbreak of war, how could an implied obligation arise between enemies ? How could the bank be " bound " to an enemy to do anything ? How is an enemy bound to take steps to preserve the property of his enemy ? So far as I understand the facts in this case, I doubt whether the latter part of the judgment of Greer J. can be supported.

There remains a point raised under art. 84 of the Treaty of Lausanne, which is made part of English law by an Order in Council under an Act. The first part of the article seems to apply between vendor and purchaser, and speaks of debts which became payable during the war under contracts entered into before the war. The debts in the present case did not apparently become payable before the war, and they were certainly not payable during the war, for the war invalidated the contracts under which they might arise, and prevented any such sums being payable. The second part of the article is difficult to understand ; but I read it to relate to the same subject-matter as in the first part, " debts payable before the war or which became payable during the war under pre-war contracts." If so, in the present case no such sums were payable before the war, or became payable during the war, for the war invalidated the contracts under which they would have been payable. If the article was intended to deal with cases like the present, the contracting parties seem to me to have failed completely to use language to express their intention.

Rowlatt J. gave judgment for the sterling amount of the bills on considerations of contract, and did not apparently deal with the effects of war, or the construction of the Treaty. In my view the true legal effect of what has happened is that the bank during the war converted the goods of the plaintiff, and, when the plaintiff sues after the war, must pay damages for conversion, to be ascertained by an inquiry unless the parties agree. The measure of damages was not argued before us, and I express no opinion on it.

The judgment of Rowlatt J. in favour of the plaintiff should be varied in the way indicated, but as the defendants have substantially failed they must pay the costs of the appeal. The costs of the inquiry should be in the discretion of the tribunal taking the inquiry.

Atkin L.J. concurred.

Judgment varied.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for respondent: *Pritchard, Englefield & Co., for Brett & Co., Manchester.*

J. S. H.

RADCLIFFE, Appellant *v.* BUCKWELL, Respondent.

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April 28.

Shipping—Safety—Loading—Submergence of Load Line—No Submergence when Cargo loaded—Saturation of Cargo by Rain and Sea Water—Submergence through consequent Increase in Weight—Liability of Master—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 442, *sub-s.* 1 (*a*).

Sect. 442, sub-s. 1, of the Merchant Shipping Act, 1894, provides: "If (*a*) any owner or master of a British ship . . . . allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line . . . . he shall for each offence be liable to a fine not exceeding 100*l.*"

A British ship loaded at a foreign port a cargo of timber, part of which was carried on deck. When the loading was completed the centre of the disc indicating the load-line of the ship was not submerged in salt water. During the voyage, however, the ship encountered bad weather and her deck cargo became saturated with rain and sea water, with the result that it increased in weight, and when the ship arrived at a British port it was found that the centres of her discs were submerged in salt water to the depth of some inches:—

Held, that the words "allows the ship to be so loaded as to submerge in salt water the centre of the disc" in s. 442, sub-s. 1 (*a*), of the Act of

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1894 did not refer merely to the moment at which the loading was completed, but referred to the condition of the ship at any point of her voyage, even though that condition did not result from any default by the owner or master, and, therefore, the master of the ship in question was guilty of an offence under the sub-section at the British port.

CASE stated by Hull stipendiary magistrate.

At a court of summary jurisdiction an information was preferred by the respondent, George William Buckwell, an officer of the Board of Trade, against the appellant, Albert John Radcliffe, charging him that on September 22, 1926, he, being then the master of the British ship *Olavus*, of Hull, unlawfully, at the Victoria Dock, Hull, "allowed the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line" contrary to s. 442, sub-s. 1 (*a*, of the Merchant Shipping Act, 1894.

On the hearing of the information on October 1, 1926, the following facts were proved or admitted:—

On September 14, 1926, the *Olavus* completed loading a cargo of 625 standards of sawn boards at Pernoviken, Finland, 194 standards being carried on the deck. When the wood was taken on board it was very dry and the weather was fine. The deck cargo was carried on two well-decks and in the bridge-deck space, that on the former being stacked above the height of the bulwarks to some 18 or 20 feet above the load-line. The *Olavus* left Pernoviken on September 14 with the centres of her discs not submerged, and she almost at once encountered very bad weather, during which there was a constant heavy, thick drizzle, with hard, sharp rain squalls, and large quantities of water were brought on board by the heavy seas. On entering the Kiel Canal the appellant realized that the ship was deep and that the centres of her discs were submerged. He did nothing to lighten her, however, as he had faith in her being able to reach Hull, and there were no special facilities in the canal for discharging cargo. While the ship was crossing the North Sea the weather was again bad, and a great deal more water was shipped. The ship arrived in the Victoria Dock, Hull, on September 22, 1926, and was visited by the Board of Trade surveyor, whose evidence was that she had a list to starboard and was deep in the water, the centres of her discs being submerged in salt water to the depth of 8¼ inches, after allowing one-quarter of an inch for water in the bilges and 1¼ inches for the specific gravity of the dock water. The submersion of the centres of the discs to the depth of 8¼ inches meant a weight of 134 tons in excess of that which the vessel should have carried if she was to be at proper marks. During the unloading of the ship it was found that practically all the timber on the fore-deck and 20 per cent. of that on the after-deck was saturated with water. The timber in the hold was dry, save for a slight dampness of the portion actually under the hatchways, due to sweating. Of the deck load of 194 standards, 97 standards, weighing in their dry state, as originally loaded, 247½ tons, were so wetted on the voyage as to absorb water to the weight of the aforesaid 134 tons.

On behalf of the appellant it was contended that he had not "allowed the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line."

On behalf of the respondent it was contended that the fact that the wet and stormy weather had largely increased the original weight of the deck cargo did not absolve the appellant from the charge, as it was the duty of a careful master, when loading his vessel with a heavy deck cargo of timber, to take into consideration the likelihood of meeting bad weather, with the resultant absorption of water by the cargo and increase in its weight.

The magistrate was of opinion that the centres of the discs were submerged when the ship arrived at Hull owing to a great increase in the weight of the deck cargo due to absorption of both sea and rain water on the voyage from Finland, and he held that the appellant had at the Victoria Dock, Hull, allowed the ship to be so loaded as to submerge in salt water the centre of the disc indicating her load-line. He accordingly convicted the appellant and ordered him to pay a fine of 50*l.*, with 5*l.* 5*s.* costs, or to be committed to prison for sixty days.

The appellant being dissatisfied with this determination, the magistrate stated this case for the opinion of the Court whether he had come to a correct decision in point of law.

Clement Davies K.C. and *Cyril T. Miller* for the appellant. The conviction of the appellant for allowing the ship to be overloaded " at the Victoria Dock, Hull," was wrong. The only point of time contemplated by s. 442, sub-s. 1 (*a*), of the Merchant Shipping Act, 1894, is that at which the loading of the ship is completed at the port of loading. Anything which may happen during the voyage and result in an increase in the weight of the cargo is provided for by the margin of safety to which effect is given in the calculation of the position of the load-line. To constitute an offence under s. 442, sub-s. 1 (*a*), there must be volition on the part of the owner or master: *Massey* v. *Morriss* (1); otherwise the sub-section would have been made to read, " if at any time the centre of the disc indicating the load-line is submerged. . . . ." In the present case the appellant did not " allow the ship to be so loaded as to submerge in salt water the centre of the disc " within the meaning of the sub-section. He allowed a legal and proper loading, and the submergence which occurred afterwards was due to an act of God or a peril of the sea. When s. 438 of the Act prescribes a " maximum load-line " it legalises a loading to that maximum load-line and not merely a loading to some point below it which may result in the submergence of the ship to the maximum load-line if certain reasonably possible events occur. If the contention advanced on behalf of the respondent before the magistrate were correct a tremendous burden is placed on the master of a ship which is being loaded with the kind of cargo with which we are concerned here. He must forecast what sort of weather he will meet on the voyage before he can decide how much deck cargo he can carry.

[He referred to s. 451 of the Act of 1894 and s. 10 of the Merchant Shipping Act, 1906, and the regulations made under the Act of 1894 on January 12, 1899 (St. R. & O., 1899, No. 8).]

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(1) [1894] 2 Q. B. 412.

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Sir Douglas Hogg A.-G. and *Bowstead* for the respondent were not called on to argue.

LORD HEWART C.J. The contention which has been made on behalf of the appellant is that the *Olavus* was not overloaded within the meaning of s. 442, sub-s. 1 (*a*), of the Merchant Shipping Act, 1894, at the Victoria Dock, Hull, which, it is to be observed, was not the port of loading. Part V. of the Merchant Shipping Act, 1894, in which s. 442 is included, is headed "Safety," and the sections that constitute it are primarily concerned with the safety of those who go down to the sea in ships. Sect. 442, which prescribes a penalty for offences in relation to the marking of the load-line, is not the least important of those sections. The important words in s. 442, sub-s. 1 (*a*), for the purposes of the present case are "allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line." No doubt, as a mere matter of grammatical construction, those words are ambiguous. They may refer merely to the actual time of the carrying out of the process of loading, but they may equally well refer to the condition of a loaded ship at any point of her voyage. In my opinion, where the process of loading has been completed and afterwards, through such a cause as that which the facts of this case disclose, the vessel is submerged improperly, it is accurate to say that the master has allowed the ship then and there to be in the state or condition of being overloaded. The same words as those in s. 442, sub-s. 1 (*a*), appear in s. 439 of the Act, which provides that "if a ship is so loaded as to submerge in salt water the centre of the disc indicating the load-line, the ship shall be deemed to be an unsafe ship . . . . and such submergence shall be a reasonable and probable cause for the detention of the ship." The contention, therefore, of the appellant that the only moment at which the question may be asked, "Is the ship so loaded that the centre of the disc indicating the load-line is submerged in salt water?" is the particular moment at which the process of loading the cargo has just been completed, involves the further proposition that, if a ship which is apparently loaded as she should be at the port of loading has a considerable addition made to the weight of her cargo during the voyage by the absorption of water from the skies or from the waves and is thereby, under stress of weather, driven into a port of refuge and is there found to be submerged beyond the proper point and in a condition which would have rendered her an unsafe ship in the port of loading, she is not an unsafe ship at the port of refuge and cannot be detained there. With all due respect to the counsel who advanced that argument, I cannot help thinking that it is a reductio ad absurdum. I think that the words "so loaded as to submerge in salt water the centre of the disc indicating the load-line" have the same meaning in s. 439 and in s. 442, sub-s. 1 (*a*), and that they cover a case where the master of a ship is charged with allowing the ship to be in a condition of having been overloaded. Although the cargo in the present case was loaded in Finland the appellant, in my opinion, at the Victoria Dock, Hull, allowed the ship to be so loaded as to submerge in salt water the centre of the disc, and his conviction of an offence under s. 442, sub-s. 1 (*a*), was, therefore, right. I think that the magistrate might well hold that it was the duty of a reasonably careful master in all the circumstances to take into consideration at the time of actual loading the likelihood of bad weather and its probable effect on a heavy deck cargo of sawn boards.

AVORY J. I am of the same opinion. In my view, the words "allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line" in s. 442, sub-s. 1 (*a*), of the Act of 1894 should be construed to mean, "permits the ship to be overloaded at the particular place where he is charged with the offence," and I can see no reason to attribute to those words a different meaning in s. 442, sub-s. 1 (*a*), from that which they bear when they appear in s. 439. It cannot be doubted that, if this

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ship had been found at an intermediate port in the condition in which it was found at Hull, she would have been liable to be detained under s. 439.

SHEARMAN J. I am of the same opinion. In my judgment, the master of a ship allows her to be so loaded as to submerge the centre of the disc whenever he allows an act of loading which may reasonably be expected to cause that submersion at any time during the voyage and in fact does so.

Appeal dismissed.

Solicitors for appellant: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitor for respondent: *Solicitor to the Board of Trade.*

G. F. L. B.

OAKLEY v. WILSON.

1927

May 3, 12.

Landlord and Tenant—Rent Restriction—Decontrol—Dwelling-house let to quarterly Tenant—Sublet to weekly Tenant—"Landlord"—Whether quarterly Tenant as "the landlord" was entitled to Possession—Action for Trespass—Small Tenements Recovery Act, 1838 (1 & 2 *Vict. c.* 74), *s.* 3 —*Rent and Mortgage Interest Restrictions Act,* 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

A quarterly tenant of a dwelling-house which he has sublet may be the "landlord" of the premises within s. 2, sub-s. 1, of the Rent Restriction Act, 1923, so that if he obtains possession of the whole of the dwelling-house after the passing of that Act the house becomes decontrolled.

The defendant was, and had been for many years, the quarterly tenant of a cottage which was a dwelling-house within the Rent Restriction Acts. The cottage was in the occupation of a sub-tenant, but in December, 1925, the sub-tenant died, and the defendant took possession of the cottage and remained in actual possession for some ten days, when she let the cottage to the plaintiff. Subsequently the defendant served upon the plaintiff a notice to quit, and obtained a warrant of possession under the Small Tenements Recovery Act, 1838, from the justices. The plaintiff thereupon brought an action against the defendant in the county court under s. 3 of the Small Tenements Recovery Act, 1838, to recover damages for trespass, alleging that the defendant had not, when the warrant was granted, lawful right to the possession of the premises. The county court judge held that the defendant was the landlord of the dwelling-house within the meaning of s. 2, sub-s. 1, of the Rent Restriction Act, 1923, that the premises had become decontrolled, and that therefore the defendant had a lawful right to the possession of the premises:—

Held, on appeal, that the county court judge was right in so holding.

APPEAL from a decision of the judge of the Guildford County Court, giving judgment for the defendant in an action for trespass.

The defendant, Mrs. E. M. C. Wilson, was the local representative of the Soldiers' and Sailors' Help Society at Woking, and as such she had taken on a quarterly tenancy at a rental of 2*l*. 12*s*. a quarter, the tenant paying rates and taxes, a cottage, which was a dwelling-house within the Rent Restriction Acts. She had been the tenant of this cottage for some eighteen years. In the latter part of 1925 it was in the occupation of one Riordan, to whom the defendant had sublet it, but on December 4, 1925, Riordan died, and the cottage became vacant. The defendant then obtained the keys and took possession of the cottage, had it cleaned out, and after an interval of about ten days let it to the plaintiff as a weekly tenant at a rent of 2*s*. 6*d*. per week, as the county court judge found, though for some time after the plaintiff entered into occupation he had in fact paid no rent at all. From July, 1926, however, the plaintiff had been called upon to pay and had paid a rent of 2*s*. 6*d*. a week.

There was no question that the defendant between December 4 and 14, 1925, had come into actual possession of the cottage.

In August, 1926, some differences arose between the plaintiff and the defendant, and the defendant gave the plaintiff notice to quit, expiring on September 2, 1926. Subsequently other notices to quit were served, and on a notice to quit served on September 21, 1926, to expire on October 4, 1926, proceedings were taken under the Small Tenements Recovery Act, 1838, by the defendant against the plaintiff. These proceedings failed, on the ground that that notice to quit was bad.

A fresh notice to quit was then served on October 19, 1926, to expire on October 28, 1926, and upon this notice a warrant of possession was granted by the justices on November 13, 1926.

On December 10, 1926, the plaintiff brought an action in the county court under s. 3 of the Act of 1838 for damages for trespass, alleging that the defendant had not, when the warrant was granted, lawful right to the possession of the premises.

The county court judge in the course of his judgment said: "This action for trespass, which was brought by the tenant, Oakley, under the provisions of s. 3 of the Small Tenements Recovery Act, 1838 (1), is in effect an appeal from the decision of the justices on a point of law. The question therefore for decision is whether, when the justices made an order of ejectment and granted a warrant of possession to Mrs. Wilson, she had a right under the law as it at present exists to recover the possession of these premises. The ground on which Mrs. Wilson based her claim before the justices, and which constitutes her defence in this action, is that she had duly determined Oakley's tenancy by a valid notice to quit, and that the premises were not within the protection of the Rent Restriction Acts by reason of the fact that they were decontrolled premises within the meaning of s. 2, sub-s. 1, of the Rent Restriction Act of 1923. (1) The justices apparently came to the conclusion that Oakley's tenancy of the cottage was not protected by the Act and made an order on that ground, and I am asked to say that they were wrong. The question is one I think of considerable difficulty.

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(1) The Small Tenements Recovery Act, 1838, provides by s. 1 that where the tenancy of any house let at a rent not exceeding 20*l.* a year has been determined by a legal notice to quit, and the tenant refuses to quit and deliver up possession of the premises, the landlord may give him notice of his intention to proceed before justices to recover possession according to the mode prescribed in this Act, and if the tenant fails to show reasonable cause why possession should not be given under the Act the justices may, on proof of the determination of the tenancy, issue a warrant directing the constables to give possession to the landlord.

Sect. 3: "In every case in which the person to whom any such warrant shall be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant, ... and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall supersede the warrant so granted, and the plaintiff shall be entitled to double costs in the said action of trespass."

"A very difficult question seems to me to be whether Mrs. Wilson was in the circumstances of this case the landlord of the cottage within the meaning of s. 2, sub-s. 1, of the Act of 1923. If she was, the premises were decontrolled and she had a lawful right to possession. If she was not the landlord the premises had not been taken out of the protection of the Act. If the proviso to that section applied to the present case the difficulty would be solved, but the proviso cannot apply to this case, because it has reference only to a subletting by a tenant—which I think means an occupying tenant—of part of a house, and that is not this case. That proviso contemplates three persons—namely, the landlord, the tenant and the sub-tenant.

"There is no doubt that the expression 'landlord' may in numerous cases include a mesne tenant. That is clear from the definition of 'landlord' in s. 12 of the Act of 1920, and there appears to be no doubt that tenants under long leases may be 'landlords' for the purpose of s. 2 of the Act of 1923: see per Lord Darling in *Jenkinson* v. *Wright*. (2) I am inclined to think that it ought to depend on the circumstances of the particular case whether or not the tenant comes within sub-s. 1 of s. 2 of the Act of 1923. Here there are the landlord, Mr. Garrod, who is not before the Court, the quarterly tenant, Mrs. Wilson, and a weekly sub-tenant, Mr. Oakley. The question is whether, when a quarterly tenant who was in possession of the whole of the house at or subsequent to the passing of the 1923 Act and has afterwards let the house to a weekly sub-tenant, it was the intention of the Act that the quarterly tenant in the circumstances of the case like the present should be deemed the landlord so as to take the house out of the Rent Restriction Act so far as the sub-tenant was concerned. The view I should have been inclined to take, apart from authority, is that such was not the intention of the Act, because the result would be that the superior landlord, not having been in possession of the whole of the house, would be bound by the restrictions of the Act so far as his tenant was concerned, and that the mesne tenant would not be bound by the restrictions of the Act so far as the sub-tenant was concerned. That position would, it seems to me, defeat the policy of the Act.

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(1) Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house."

(2) [1924] 2 K. B. 645, 649.

"If Mrs. Wilson had been in occupation of the cottage and had sublet part of it to Oakley, then under the proviso the part so sublet would undoubtedly not have been decontrolled. That was held by the Divisional Court in *Doulin* v. *Parcell.* (1) In that case a tenant, who was apparently holding on after the expiration of a three years' agreement, whether as a statutory tenant or on what terms does not appear, was in possession of the whole house at the material time. Subsequently he let four rooms of the house to a sub-tenant, who thereafter asked for an apportionment of the rent. It was contended that he was not entitled to an apportionment on the ground that the rooms forming the dwelling-house he occupied were decontrolled. The Divisional Court, however, held that they were not decontrolled. Horridge J. said that the tenant was in possession of the whole house at the date of the passing of the 1923 Act, and there was no doubt that the premises would have become decontrolled if the first part of s. 2 stood alone, but that the proviso was applicable and the effect of that proviso was to keep the part sublet within the Act. So it appears that Horridge J. regarded the tenant in that case as an effective landlord for the purpose

(1) (1926) 43 Times L. R. 140.

of decontrol, and would have so held if the proviso had not applied.

"In another case in the Divisional Court I find a similar expression of opinion. In *Catto* v. *Curry* (1), which was a case under the proviso, Talbot J. in his judgment said that 'the Act of 1923 provides by s. 2, sub-s. 1, that where the landlord of a dwelling-house to which the Act of 1920 applies is in or comes into possession of the dwelling-house the Act of 1920 is to cease to apply to it. If the legislature had stopped there, since by s. 12 of the Act of 1920 "landlord" is to be interpreted as including a tenant who sublets to a sub-tenant, the Act of 1920 would have ceased to apply to the rooms occupied by the appellant when the respondent came into possession of them.' That appears to be the case here, for that proviso does not come in and must be excluded from consideration.

"Then, again, in *Dunbar* v. *Smith* (2), which was a case under the first part of the section and not under the proviso, it was held that where a landlord came into possession of part of a building which was let as a separate dwelling-house under the section the part became decontrolled. The point was taken in the Divisional Court that the landlord was a tenant and not the freeholder. That point was not raised in the county court, and Bankes L.J. declined to deal with that point—which would probably have decided the point in the present case—observing that 'the landlord, who in the Court below was treated for all purposes as the owner, obtained actual possession, executed certain repairs, and then relet the floor to the present tenant. In those circumstances the tenant is estopped from saying that the landlord is not in fact the landlord.' The question of estoppel in this case was not put forward, though it seems to me a point of some importance.

"I think the observations I have made show the difficulty of giving a decision on a point of this kind, and I do so with great diffidence. Apart from the expression of judicial opinion I have referred to I should have been inclined to come to the conclusion that a quarterly tenant could not have come within the meaning of a landlord for the purpose of s. 2, sub-s. 1, of the 1923 Act, but having regard to these opinions, and the fact that here only the first part of the sub-section is applicable and not the proviso, and further having regard to the definition of 'landlord' in s. 12 of the Act of 1920, I have come to the conclusion that Mrs. Wilson was a landlord of these premises within s. 2 of the 1923 Act, and in these circumstances she had a lawful right to possession at the time the warrant for possession was granted by the justices."

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(1) [1926] 1 K. B. 460, 464.

(2) [1926] 1 K. B. 360, 362.

From the decision of the county court judge in that action the plaintiff appealed to the Divisional Court.

John Harris for the plaintiff. The county court judge was wrong in holding that the defendant, Mrs. Wilson, was a landlord of the cottage within s. 2, sub-s. 1, of the Rent Restriction Act, 1923, and that as she had come into possession of the cottage since the passing of that Act the cottage had become decontrolled. At the time the defendant obtained the warrant for possession of the cottage she had no lawful right to the possession of the cottage, because the Rent Restriction Acts still applied to the cottage. When the sub-tenancy of Riordan terminated by his death, the defendant entered into possession of the cottage not as landlord but as tenant under her own tenancy agreement. She had ceased to be a landlord when her tenant, Riordan, died. It is true that s. 12, sub-s. 1 (*g*), of the Rent Restriction Act, 1920, includes in the expression "landlord" any person, other than the tenant, who is or would but for the Act be entitled to possession of the dwelling-house. But if it were held that the defendant was a landlord of this cottage, it would follow that the word "landlord" has a different meaning in s. 2, sub-s. 1, of the Act of 1923, to that which it has in the proviso to that section where three persons are clearly referred to—namely, landlord, tenant and sub-tenant. I submit that the word ought to have the same meaning in both the section and the proviso to the section. It was held by the Divisional Court in *Cohen* v. *Gold* (1) that the possession of a dwelling-house, in order that it should become decontrolled, must be the possession of a landlord. In this case the defendant was neither the owner of the cottage nor the holder of a long lease in respect of it, and the only way in which the term "landlord" could be applied to her was that she was the person who had created the sub-tenancy. In *Jenkinson* v. *Wright* (2) Lord Darling expressed the view that a tenant for a long term of years was a landlord within the section, but there the rent was less than two-thirds of the rateable value, and therefore s. 12, sub-s. 7, of the Act of 1920, prevented the Rent Restriction Acts applying to the tenancy: see per Rowlatt J.

[ACTON J. The relationship of landlord and tenant arises out of contract and does not depend upon the length of the tenancy. It is only when the tenant ceases to be in occupation that the landlord can enter into possession of the dwelling-house.]

The word "landlord" in the section ought to be read as meaning "owner" or "head landlord." The object of the Act of 1923 was to protect tenants and to prevent landlords holding up property in order to sell it.

[ACTON J. I should have thought that the provisions of the statute with regard to decontrol of houses was to protect landlords.]

Sect. 2, sub-s. 1, of the Act of 1920 speaks of "the landlord" of a dwelling-house and not "a landlord." There is no reason why a different construction of the section should be adopted in a case where the whole of a dwelling-house is sublet to that which has been adopted where part only of a dwelling-house has been sublet. At the time the defendant came into possession of the cottage she was not "the landlord" or "a landlord" within the meaning of the section, as there was no existing tenancy in relation to which she was "landlord"; she had ceased to be a landlord on the death of Riordan. She was not a person deriving title under the original landlord, and therefore she did not come within

(1) [1927] 1 K. B. 865.

(2) [1924] 2 K. B. 645.

the definition of "landlord" in s. 12, sub-s. 1 (*f*), of the Act of 1920; neither did she come within the definition in sub-s. 1 (*g*), because she was not a "person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house," and therefore she was not entitled but for the Act to the possession of the dwelling-house. She was in fact the tenant of the cottage, and entered into possession thereof as the tenant and not as the landlord.

F. W. Beney for the defendant. Sect. 3 of the Small Tenements Recovery Act, 1838, in speaking of the person obtaining the warrant of possession not having a lawful right to the possession of the premises, was referring to a legal defect in the landlord's title, and was not referring to the restrictions put upon landlords by the Rent Restriction Acts. A landlord may have a lawful right to the possession of premises, although he cannot enforce that right by reason of the Rent Restriction Acts.

[TALBOT J. The Act provides that if a landlord obtains a warrant of possession when he has no lawful right to the possession of the premises, he shall be in no better position than if he had gone into possession.]

The defendant was a landlord of the cottage within the meaning of s. 2, sub-s. 1, of the Act of 1923, and as she obtained possession of the cottage after the passing of that Act it became decontrolled. A limited meaning ought not to be put upon the word "landlord" in the section merely because in the proviso to the section it bears a limited meaning. That proviso applies only to a case where part of a dwelling-house is sublet, and it expressly deals with the three parties —landlord, mesne tenant and sub-tenant. That was the construction put upon the proviso by the Divisional Court in *Doulin* v. *Parcell.* (1) The defendant was landlord of the cottage at common law, and she also came within the definition of "landlord" in s. 12, sub-s. 1 (*g*), of the Rent Restriction Act, 1920.

[ACTON J. The argument on behalf of the plaintiff is that under the Rent Restriction Acts there can only be one person who can be spoken of as the landlord of a particular dwelling-house, whereas in fact there may be several landlords.]

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(1) 43 Times L. R. 140.

If a landlord obtains possession of a dwelling-house so that it becomes decontrolled, it is decontrolled for all purposes and as against all persons: *Prout* v. *Hunter*. (1) When proceedings are taken under the Small Tenements Recovery Act, 1838, to recover possession of a dwelling-house, the justices have to decide all questions that arise under the Rent Restriction Acts: *Tompkins* v. *Rogers*. (2) The plaintiff was in arrears with his rent, and therefore could not claim the protection of the Rent Restriction Acts, and the defendant had therefore lawful right to the possession of the premises.

John Harris replied.

Cur. adv. vult.

May 12. ACTON J. read the following judgment as the judgment of himself and Talbot J.

This was an appeal from a decision of His Honour Judge Harington giving judgment for the defendant in an action for damages for trespass. [His Lordship having read the facts set out above continued :] On those facts the county court judge held that the defendant, Mrs. Wilson, was "the landlord" of the dwelling-house in question within the meaning of s. 2, sub-s. 1, of the Act of 1923. It is agreed that if he was right in this, this appeal must fail, for there was no question that she had come into possession of the whole of the dwelling-house after the passing of the Act and before she let the dwelling-house to the plaintiff, Oakley. The plaintiff's case therefore depended upon whether it could be shown that the county court judge was wrong in so holding. This raises a point for the decision of this Court which, so far as we are aware, is novel.

It is convenient to consider this question from two points of view—namely, (1.) What is the meaning in law, independently of the Rent Restriction Acts, of the word "landlord"?

(1) [1924] 2 K. B. 365, 736.

(2) [1921] 2 K. B. 94.

and (2.) whether there is a special meaning to be given to the words "the landlord" in the particular section of the Act of 1923 with which this case is concerned? The relation of landlord and tenant in its ordinary legal significance arises whenever one party confers on another the right to exclusive possession of premises, e.g., a dwelling-house, for a time which is either subject to a definite limit originally, as in the case of a lease for a term of years, or which though originally indefinite can be made subject to a definite limit by either party, as in the case of a tenancy from year to year, or a quarterly, monthly, or weekly tenancy. This relation is created by contract to which there is usually, though not necessarily incident, a right on the part of the landlord to receive from the tenant payment for the use of the premises in the shape of rent. "The word 'landlord' does not mean the lord of the soil, but the person between whom and the tenant the relation of landlord and tenant exists": per Bramwell B. in *Churchward* v. *Ford*. (1) The relation of landlord and tenant is of course fully established only when the tenant has entered on the premises let. If that has happened pursuant to a contract of the kind indicated the parties to such a contract are accurately described as the landlord and the tenant.

With regard however to the recent legislation as to the restriction of rents the argument for the plaintiff is that "the landlord" in s. 2, sub-s. 1, of the Act of 1923 means either the owner of the premises or what is somewhat vaguely described as the "head landlord," by which we understand to be meant the person who by contract first creates a tenancy of the premises in question, subject perhaps only to the provisions of s. 12, sub-s. 7, of the Act of 1920, and the consequences of those provisions as illustrated by the case of *Finey* v. *Gougoltz*. (2) In any event it is said that one who is himself no more than a quarterly tenant, and has sublet the premises of which he is but a quarterly tenant on a weekly tenancy, cannot be said to be "the landlord" within the meaning of s. 2, sub-s. 1, of the Act of 1923. It was not conceded that a lessee of a dwelling-house for a term of years, however long, who sublets the whole of the premises on a tenancy of an originally indefinite character, such as a tenancy from year to year, or a quarterly, monthly or weekly tenancy, could be "the landlord" within the meaning of s. 2, sub-s. 1, of the Act of 1923. But it was contended that, even if that had to be conceded, it was still correct to say that a quarterly tenant who sublet on a weekly tenancy was not "the landlord" within the meaning of this sub-section. Now these very words "the landlord" appear not only in this sub-section, but elsewhere, and very frequently in the Acts of 1920 and 1923. It is therefore expedient to consider how these words are used elsewhere, for we think that the same meaning should be given to these words wherever they occur, unless there is something in the context which clearly indicates that a different meaning is intended. It is probably unnecessary and would be tedious to consider separately all the passages in which these words are used, but they are used in many cases where the context seems to show that their meaning cannot be limited to that of "owner" or "freeholder" or "head landlord," whatever that may mean. The most striking of such passages is perhaps that to be found in s. 2, sub-s. 6, of the Act of 1920: "Any question arising under sub-sections 1, 2 or 3 of this section shall be determined on the application either of the landlord or the tenant by the county court . . . .," as qualified by s. 7, sub-s. 3, of the Act of 1923: "In sub-s. 6 of s. 2 of the principal Act the expression 'landlord' shall, in relation to a sub-tenancy, be taken to include not only the person who is immediate landlord of the sub-tenant but also the landlord of that person."

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(1) (1857) 2 H. & N. 446, 450.

(2) [1926] 2 K. B. 322.

Other examples of the use of these words with an apparently similar meaning are to be found in s. 3, sub-s. 2; s. 5, sub-s. 1 (*c*) (*d*) (*f*) (*h*); ss. 11, 14, sub-ss. 1 and 2, and s. 15, sub-ss. 2 and 3, of the Act of 1920. These sections call for no comment, and in our opinion there is not anything which indicates that the words bear any different meaning in s. 2, sub-s. 1, of the Act of 1923.

It is indeed to be observed that the first proviso to s. 2, sub-s. 1, of the Act of 1923 appears to assume that a tenant of a dwelling-house may be also in his turn the landlord of that dwelling-house if he sublets it, or of any part thereof, which is in itself a dwelling-house within the meaning of the principal Act, if he sublets that part.

The authorities which were reviewed and discussed by the learned county court judge do not seem to us to contain anything which is in conflict with the conclusion at which he arrived—namely, that Mrs. Wilson was "the landlord" within the meaning of s. 2, sub-s. 1, of the Act of 1923. In our opinion the learned judge's comments upon the cases of *Dunbar* v. *Smith* (1); *Catto* v. *Curry* (2); and *Doulin* v. *Parcell* (3) were apposite and unexceptionable, and led him to a correct conclusion.

We are therefore of opinion that this appeal should be dismissed. Mr. Beney for the defendant indicated other points upon which he proposed to rely if necessary, but, in view of the conclusion we have come to on the main question, consideration of these points is unnecessary.

Appeal dismissed.

Solicitor for plaintiff: *Harry Hunt, Woking.*
Solicitors for defendant: *Barton & Hanning.*

(1) [1926] 1 K. B. 360.
(2) [1926] 1 K. B. 460.
(3) 43 Times L. R. 140.

R. F. S.

1927
May 16.

MACNAGHTEN *v.* DOUGLAS.

Medical Acts — Unregistered Persons — Osteopath — Recovery of Fees for Treatment—Medical Act, 1858 (21 *&* 22 *Vict. c.* 90), *s.* 32.

The Medical Act, 1858, s. 32, provides: "No person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act":—

Held, that the above section does not apply to an osteopath, so as to prevent him from recovering at law fees charged for treatment as distinct from diagnosis or advice.

Appeal from Bloomsbury County Court.

The plaintiff was an osteopath, practising at 40 Weymouth Street, London, W., and his claim was for 30*l*. 9*s*. for professional services rendered to the defendant's wife between March 10, 1926, and April 25, 1926.

The defendant's wife came to the plaintiff and asked for osteopathic treatment. The plaintiff examined her, and found her to be suffering from nervous debility and facial neuralgia caused by inflammation of the antrum under the eye. He treated the bones in the neck and also in the lumbar region on various occasions, and for this treatment his charges amounted to 30*l*. 9*s*. His scale of charges was 3*l*. 3*s*. for a consultation and 2*l*. 2*s*. for each single visit (including treatment), and a notice to this effect was hung upon the walls of his consulting room. The plaintiff described himself as a doctor. He had an American degree of "doctor of osteopathy," and was a Bachelor of Arts of Trinity College, Dublin. He had no British medical degree. At the trial in the county court counsel for the defendant amended the defence by leave of the judge, and pleaded the Medical Act, 1858, s. 32. The plaintiff then gave his evidence, and was cross-examined. After reference to *Hall* v. *Trotter* (1), the county court judge held that the Medical Act, 1858, s. 32, applied, and gave judgment for the defendant.

The plaintiff appealed.

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(1) (1921) 38 Times L. R. 30.

A. C. Jackson for the plaintiff. An osteopath's claim for fees for treatment is not within the ambit of the Medical Act, 1858, s. 32, because it is not a claim for "medical or surgical advice attendance or operation." So far as the claim here includes fees for osteopathic treatment the plaintiff is entitled to recover, and the deputy county court judge was wrong in stopping the case. *Hall* v. *Trotter* (1) is an exact parallel.

[He was stopped.]

Laporte Payne for the defendants. An osteopath can only recover if called in to give specific treatment. Here the plaintiff treated the patient exactly in the manner of a medical practitioner, which is the very danger aimed at by the Medical Act, 1858. He diagnosed the case, then prescribed treatment, and gave it.

The preamble to the Medical Act reads: "Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners." Prior to that Act physicians' fees were not recoverable by action, and the plaintiff here is in no better position.

[He cited *Lipscombe* v. *Holmes* (2); *Chorley* v. *Bolcot* (3); *Howarth* v. *Brearley* (4); *Davies* v. *Makuna*. (5)

No reply was called for.

ACTON J. This is an appeal from the deputy county court judge sitting at Bloomsbury, who decided that the plaintiff's claim for professional services as an osteopath was barred by the Medical Act, 1858, s. 32. The plaintiff in his evidence at the county court stated that he had studied osteopathy in America in 1923 and had a diploma as doctor of osteopathy from an American college. He admitted that the profession of osteopathy or any qualification in that profession is not recognized in this country. He holds no British medical degree, but is a Bachelor of Arts of Trinity College, Dublin. He practises as an osteopath at 40 Weymouth Street, W.

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(1) (1921) 38 Times L. R. 30.

(2) (1810) 2 Camp. 441.

(3) (1791) 4 T. R. 317.

(4) (1887) 19 Q. B. D. 303.

(5) (1885) 29 Ch. D. 596.

The particulars of the claim are "for 30*l*. 9*s*. for professional services rendered by the plaintiff as an osteopath to the defendant's wife from March 10, 1926, to April 25, 1926." The plaintiff stated that the defendant's wife came to him desiring osteopathic treatment, that he examined her, and came to a certain conclusion as to her complaint and as to the proper remedy, and that he treated her according to the principles of osteopathy, which he had studied. He treated the bones in the neck and other bones, chiefly in the lumbar region, and continued the treatment until April 25, 1926. The lady gave him a general description of her symptoms, and it would appear that he acquainted her with the conclusions at which he had arrived and advised her that the kind of treatment he was about to perform would be remedial. No defence was originally filed in the county court, but when the case came on for hearing the deputy judge allowed the defendant to set up the statutory defence that the plaintiff was prevented from recovering by the Medical Act, 1858, s. 32. The question for us to decide is whether the plaintiff's claim is wholly barred, as the deputy judge held, by this section.

The question is a difficult one, but it has already been decided in this Court in *Hall* v. *Trotter*. (1) In that case the plaintiff sued the defendant in the county court for 58*l*. 17*s*., the amount of his fees for osteopathic treatment to the defendant, his wife and daughter during the year 1920. The plaintiff, in that case, a lady, was in the same position as the plaintiff in the present case. She held a diploma from an American college of osteopathy, she was not registered as a medical practitioner, but was carrying on business as an osteopath, treating people for reward.

The question was the same as that which is raised here. The facts are not fully set out in the case, and the report does not state whether any diagnosis or advice was given by the plaintiff as distinguished from manual or massage treatment, and if so how far that diagnosis or advice went. The county court judge held, according to the report, that osteopathic treatment was not within the Act, and gave judgment for the plaintiff. There was an appeal to this Court, and the Court (Horridge and Shearman JJ.) dismissed the appeal after an argument of the same nature as we have heard in this case. In his judgment, Horridge J., after referring to the Medical Act, 1858, s. 32, and to the finding of fact by the county court judge that osteopathic treatment was not within the Act, said that in his view of the finding of the judge, the plaintiff did not give any advice. She gave certain treatment to the bodies of three patients. He declined to be led into definitions. He was satisfied that this case did not fall within the Act. The judgment must, therefore, be affirmed and the appeal dismissed. Shearman J. agreed, and said, according to the report, "that they had only to consider what this woman did. She did not profess to advise anyone what was the matter, but after having got a diploma from a college in America, she applied her knowledge of anatomy to help her to determine the part of the body to which she should apply the treatment which she had been specifically called in to give. In applying the section the judge must bear in mind the recital in the Act. He thought that the judge here was right, but he was far from saying that anyone who chose to call himself an osteopath could charge for any service which he chose to render." The claim here was for 30*l.* 9*s.* for professional services rendered as an osteopath, and it was admitted on behalf of the plaintiff that if the charges were analysed and it were proved that any part of these charges was for advice, he might not be in a position to recover them by reason of the Medical Act, 1858, s. 32. But it was complained that the deputy county court judge had stopped the case after the evidence had been given, on the ground that by the operation of this section the plaintiff could not recover anything and that his claim was wholly barred. In my opinion this Court is bound to follow the decision in *Hall* v. *Trotter* (1), although it would be satisfactory if the report of the facts and judgment were in greater detail. This case must be sent back for a new trial.

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(1) (1921) 38 Times L. R. 30.

(1) (1921) 38 Times L. R. 30.

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DOUGLAS.

I express no opinion whether it is possible to split up the claim into two parts—(*a*) for treatment and (*b*) for advice—but I think that the deputy county court judge was wrong in holding that no part of these charges can be recovered.

TALBOT J. I agree. Had it not been for the decision in *Hall* v. *Trotter* (1) I should have thought there was a strong argument in support of the decision at which the deputy county court judge arrived. There are points which make the two cases distinguishable, in particular that to which our attention has been called, that the plaintiff here gave certain advice to the defendant's wife. But it is difficult to imagine a case of this kind in which some advice is not given. It seems to me undesirable to distinguish decided cases on narrow grounds, and on the whole I think we ought to follow *Hall* v. *Trotter* (1), and to say that the deputy county court judge was wrong in declining to proceed further with the case, and in holding that the whole of the plaintiff's claim was barred by the Medical Act, 1858, s. 32.

I also express no opinion whether it is possible to divide the claim into two branches, one claim for treatment and the other for advice, and I content myself with saying that the case must go back for a new trial.

Case remitted.

Solicitors for plaintiff: *Lucas & Bailey.*
Solicitors for defendant: *Blewitt & Son.*

(1) 38 Times L. R. 30.

F. P. F.

[IN THE COURT OF APPEAL.]

C. A.
1927
May 31 ;
June 1.

IMPORTERS COMPANY, LIMITED *v.* WESTMINSTER BANK, LIMITED.

[1925. I. 1970.]

Bill of Exchange—Banker—Cheque—Collecting crossed Cheque for "customer"—Bank collecting Cheque for another Bank—Cheque crossed "Account payee only"—Negligence—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 82.

The appellants, who carried on business in London, bought paper from manufacturers in Germany, to pay for which they drew cheques on the National Provincial Bank in favour of those manufacturers, crossing them and marking them "Account payee only." The appellants sent those cheques to S., their agent in Germany, whose duty it was to hand them to the drawees. Instead of doing this, S. indorsed the cheques by forging the drawees' names, added his own name underneath, and paid them into his account with the Oscar Heilmann bank in Dresden. That bank, which had a drawing account with the respondents, sent the cheques to the respondents for collection, having indorsed them "To the order of the Westminster Bank, Ld., value in account. Oscar Heilmann." On receipt of the cheques the respondents indorsed them and presented them through the Clearing House to the National Provincial Bank, received the proceeds and credited same in their books to the Oscar Heilmann bank. In an action by the appellants against the respondents to recover the value of the cheques or damages for their conversion, the respondents pleaded that they in good faith and without negligence received payment for their customers the Oscar Heilmann bank within the meaning of s. 82 of the Bills of Exchange Act, 1882, and that the words "Account payee only" did not amount to a direction to them as a collecting bank as to the disposal of the proceeds. They gave evidence that their practice, and the general practice of bankers, in dealing with such cheques was merely to see that the indorsement to them was in order. It was admitted that the respondents acted in good faith :—

Held, (1.) that there was nothing on the cheques to put the respondents as a collecting bank upon inquiry as to the regularity of the indorsements, and that they had discharged the onus of negativing negligence on their part ; (2.) that the proper inference from the facts was that the respondents received payment of the cheques for their customers and not for themselves as holders for value ; (3.) that the Oscar Heilmann bank was a "customer" of the respondents within the meaning of s. 82, the expression "customer" there used not being limited to an ordinary private customer of a bank ; and (4.) that, accordingly, the respondents were protected by the section.

Decision of MacKinnon J. [1927] 1 K. B. 869 affirmed.

Appeal from a decision of MacKinnon J. reported [1927] 1 K. B. 869.

The plaintiffs claimed to recover from the defendants 1905*l.* 15*s.* 11*d.* as money had and received by the defendants to the plaintiffs' use, or, alternatively, as damages for the wrongful conversion of a number of cheques.

The plaintiffs, who carried on business in London, purchased large quantities of paper from manufacturers in Germany. In 1924 they appointed one Schultze as their buying agent in Germany. The plaintiffs' practice was to draw cheques on their bank in London, the National Provincial Bank, in favour of the German manufacturers, crossing them and marking them "Account payee only," and then sending them to Schultze in Dresden, whose duty it was to hand them to the German manufacturers. After a time Schultze began to commit a series of frauds. He indorsed the cheques by forging the manufacturers' names and adding his own name underneath. He then paid them into his own account, which he kept with the Oscar Heilmann bank. In due course the Oscar Heilmann bank, which had a drawing account with the defendants, sent the cheques to the defendants for collection, having indorsed them "To the order of the Westminster Bank, Ld., value in account. Oscar Heilmann." The defendants, after receiving the cheques, indorsed them and presented them through the Clearing House to the National Provincial Bank, received the proceeds, and credited same in their books to the Oscar Heilmann bank.

Schultze had become bankrupt, and the Oscar Heilmann bank was also insolvent.

By their defence the defendants pleaded that the cheques were forwarded and indorsed to them for collection by their customers, the Oscar Heilmann bank; that they had in good faith and without negligence received payment of the cheques for those customers; and they relied on s. 82 of the Bills of Exchange Act, 1882. (1) They further said that the words "Account payee only" did not amount to a direction to them, as a bank collecting cheques for another bank, as to the disposal of the proceeds. Their witnesses stated that in dealing with such cheques collecting bankers concerned themselves merely to see that the indorsement to them was in order.

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(1) Bills of Exchange Act, 1882, s. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

MacKinnon J. gave judgment for the defendants, holding that there was nothing in the indorsements to put the defendants upon inquiry or to suggest that the mandate contained in the words "Account payee only" was being departed from; that the defendants had received payment for a "customer"—namely, the Oscar Heilmann bank—within the meaning of s. 82; and therefore that the defendants were entitled to the protection of that section.

The plaintiffs appealed.

Pritt K.C. for the appellants. The respondents have failed to show that in dealing with the cheques in question they acted without negligence, and they are therefore not within the protection of s. 82 of the Bills of Exchange Act, 1882. The only evidence given by them as to their practice in connection with such cheques was to the effect that they concerned themselves merely to see that the indorsement to themselves was in order; they entirely ignored the instructions on the face of the cheques, and in so doing they were negligent. No banking practice can alter the effect of the marking on a cheque of the words, "Account payee only." Those words are a positive direction to them to see that the proceeds of the cheque reach the named payee: *Akrokerri (Atlantic) Mines* v. *Economic Bank* (1); *Bevan* v. *National Bank* (2); *Ladbroke & Co.* v. *Todd* (3); *Morison* v. *London County and Westminster Bank.* (4) A collecting bank is not exempt from the obligation of seeing that the instruction conveyed by the words "Account payee only" is carried out. Further, it was negligence on the respondents' part not to inquire whether the indorsements on the cheques

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(1) [1904] 2 K. B. 465, 472.
(2) (1906) 23 Times L. R. 65, 68.
(3) (1914) 19 Com. Cas. 256, 261.
(4) [1914] 3 K. B. 356, 373–4.

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were in order. In Paget's Law of Banking, 3rd ed., p. 295, it is said that: "Some phases of duty to the true owner have been established by decision. It was, at one time, a common superstition among bankers that the collecting banker is not concerned with the indorsement on an order cheque. The omission, however, to see that such indorsement is in order, at least ostensibly, has been distinctly recognised as negligence on the part of the collecting banker": see *Bissell & Co.* v. *Fox Brothers & Co.* (1) and *Bavins & Sims* v. *London and South Western Bank.* (2) Here the respondents made no inquiry regarding the form of the indorsements by the drawees and Schultze. They should have inquired how Schultze's name came to be on the cheques.

Further, the respondents received payment of the cheques as holders for value and not for Heilmanns. There is no evidence that they collected for Heilmanns, and the Court will not assume in their favour that they were mere agents for collection. In *National Bank* v. *Silke* (3) Bowen L.J. said (4): "The case of *McLean* v. *Clydesdale Banking Co.* (5) makes that clear which to a mercantile man would have appeared clear without any decision—that if a cheque is paid to a bank on the footing that the amount may at once be drawn upon, and it is drawn upon accordingly, the bank is a holder for value in due course." It is a question of fact whether a bank is a holder for value or an agent for collection: *In re Farrow's Bank* (6), and it is for the respondents to make it clear that they were not in this case holders for value.

Lastly, it is submitted that Oscar Heilmann's bank was not a "customer" of the respondents within the meaning of s. 82. The word applies to some one who normally would be called a customer—namely, a person to whom a bank renders services which it holds itself out to render to the community. "Customer" means a lay customer, not another bank.

(1) (1884) 51 L. T. 663.
(2) [1900] 1 Q. B. 270.
(3) [1891] 1 Q. B. 435.
(4) [1891] 1 Q. B. 439.
(5) (1883) 9 App. Cas. 95.
(6) [1923] 1 Ch. 41.

[He referred to *Great Western Ry. Co.* v. *London and County Banking Co.* (1).]

Rayner Goddard K.C. and *D. B. Somervell* for the respondents were not called upon.

BANKES L.J. This is an appeal from a judgment of MacKinnon J., and the case for the appellants has been very fully put before us by Mr. Pritt, but in my opinion the judgment of the learned judge was right.

The appellants, who are an English company carrying on business in London, made purchases from manufacturers in Germany. They employed an agent in Germany, a man named Schultze, and the course of business as between the appellants and the German manufacturers, in reference to payments to those manufacturers for goods supplied, was for the appellants to draw cheques in favour of the different manufacturers, and send them to Schultze, whose duty it then was to hand them to the persons in whose favour they were drawn. Schultze acted dishonestly, and, instead of handing the cheques to the manufacturers, he kept them himself. He forged the name of the drawees, fraudulently indorsed them and paid them into his own account with the Oscar Heilmann bank, Dresden. Heilmanns employed the respondents, the Westminster Bank, to clear the cheques for them, and this the respondents did. The cheques, fourteen in all, were passed on, if that is the correct expression, to the bank upon which they were drawn, the National Provincial Bank, through the Clearing House, and in due course the respondents received through the Clearing House the proceeds. The appellants' cause of action was that the respondents, by what they did, had converted the cheques, and were bound to pay over the proceeds to the appellants by way of damages for that conversion. The respondents' case was that they, as bankers, were protected by s. 82 of the Bills of Exchange Act, 1882, in that they acted in good faith—that was not disputed; in that they acted without negligence—that was disputed; and in that they received payment for a customer—that again was disputed. The question which MacKinnon J. had to decide was whether, on those three matters, the defendants had brought themselves within the protection of the section.

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(1) [1901] A. C. 414.

The principal point of the appellants' argument is that the cheques being all crossed and marked, "Account payee only," that marking amounted to a direction to any one handling the cheques that they were only to deal with them in such a way that the proceeds must pass into the account of the payee, and that anybody who disregarded that direction acted contrary to the express direction on the face of the cheque, and must be taken to be acting negligently, and, if a bank, to be without the protection of s. 82. As I understand it, the respondents' answer to that contention is that while that form of marking is a direction to the banker of the person in whose favour the cheque is drawn, it has no application to those who are merely clearing bankers, seeing that it is not in their power to comply with the direction, because the cheque comes to, and is passed on by, them in pursuance of a mandate and in such circumstances that they cannot control the ultimate destination of the money. To that Mr. Pritt, for the appellants, says that such a contention does not avail the respondents who, when a cheque comes to them as collecting bankers in this form, must do one of two things: either refuse to deal with it at all, because they cannot comply with the direction on it, or, if they deal with it, they do so knowing that they are doing something which is irregular in disregarding the direction, and therefore, as wise people, they ought only to undertake the business where, knowing it is irregular, the person for whom they are acting is of sufficient standing to indemnify them if any trouble arises.

If I have put the case on the one side and on the other correctly, that last contention, it seems to me, renders this class of business altogether impossible. If what Lord Macnaghten said in *Capital and Counties Bank* v. *Gordon* (1), that bankers may fairly be said to bring themselves within the protection of s. 82 if they are doing only the particular form of business in the ordinary way in which such business is done, applies to every case of this class—I do not say that it does—it is at any rate an indication that a very fair, although not necessarily a conclusive test, whether bankers bring themselves within the protection of s. 82, is to see whether they are carrying on a particular class of business in the way in which business of this importance and magnitude is invariably done by those who necessarily are the only persons who can conduct it.

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(1) [1903] A. C. 240, 244.

The evidence given for the respondents was given by people of high standing, whose evidence was not contradicted, and who spoke to what, according to their view, was the universal way of doing this particular class of business. Dealing in the first instance with these cheques (but perhaps going a little further in cross-examination, without possibly having considered all the consequences), they said in substance that they were collecting bankers only, and therefore concerned themselves merely with considering whether their mandate to collect was sufficient, and they satisfied themselves about that by looking at the indorsement, which to them was their mandate, and did not concern themselves with either the form or the marking on the cheque. Whether they could justify this contention in all circumstances I am not prepared to say; but it is immaterial to consider that in the present case because, assuming that their duty might be to scrutinize the cheque in order to see whether or not it was apparently in proper form, there was nothing in my opinion upon the face or the back of the cheque to put them upon inquiry. Therefore, upon the assumption that I am right in thinking that MacKinnon J. was correct in holding that to disregard the particular form of the cheques in view of the respondents' position as merely a collecting bank was not in itself negligent, and, assuming that he was right also in holding, as I think he was, that even if the respondents had a duty to scrutinize the cheques sufficiently to show that there was nothing either on the face or on the back of them to put them on inquiry, I think the bank discharged the onus which lay upon them of showing that they acted in this particular matter without negligence.

I do not propose to go through the authorities to which our attention has been drawn. No doubt there are passages in them which are relevant upon the broad principles that one should apply to cases of this class. But no case deals with the particular point how far a collecting bank is under any duty to regard the direction contained in a cheque marked "Account payee only," and in my opinion the view that MacKinnon J. took was right. Mr. Pritt has contended that the indorsements should have put the respondents upon inquiry because of the way in which Schultze's name appears. In every case the indorsement took this form: the first indorsement was one in the name of the person or firm in whose favour the cheque was drawn. In one case the name was written in indelible pencil, but MacKinnon J. rightly paid no attention to that. What followed in each case was that Schultze wrote his own name under that of the drawee. It is said that ought to have put the respondents upon inquiry, because there was nothing to indicate that Schultze was signing per pro, or in what capacity he was signing. I cannot see the force of that argument, because there was nothing to indicate that the original drawee in the first instance did not indorse the cheque in blank, and pass it on to Schultze, who indorsed it again in blank. There is nothing on the face of the cheque to indicate that the indorsement of the drawee had to be put on by some one acting as an agent or servant. In my opinion there was nothing in the form of the indorsement which ought to have put the respondents upon inquiry. That disposes of the point as to negligence.

It was then said that the respondents were not receiving payment for a customer; that it lay upon them to establish that as a matter of fact, and as there was very little evidence given, the judge ought not to have drawn the inference he did in their favour. With reference to that we must remember that we are sitting here as a Court of Appeal in a case tried by a judge without a jury, and we should only reverse

MacKinnon J.'s decision if we were quite satisfied that in this particular matter he had drawn an inference which was not warranted by the facts. It is true that the whole history with reference to the transactions between the parties was not sifted to the bottom, but the case was fought upon the footing that the ordinary bank practice in such matters as these is at any rate common knowledge in the Commercial Court and to the judge who tried this action, and it seems to me impossible to contend with success that the inference was wrong which the judge drew from the facts, and from what is common knowledge about banking practice, that in this case the respondents were receiving payment for a customer in the sense that they were not receiving payment for themselves. On this point also the appeal fails.

It was then said that at any rate the respondents were not receiving payment for a customer even if they were not receiving payment for themselves, because in this matter Heilmanns were not a "customer." What does the expression "customer of a bank" cover? The most ordinary meaning, I suppose, is "a person who keeps an account at the bank." Such a person is obviously a customer. But banks do various kinds of business, and in all those the individuals or the companies with whom they do the business may properly be called customers; and they can properly be so called, whether they are individuals or whether they are banks. In this case this class of business of collecting cheques was done between bank and bank, and it seems to me impossible to contend, as a matter of law, that the bank for which the respondents were doing the business were not, in reference to that business, their customer. I cannot accept Mr. Pritt's argument that Heilmanns were not the respondents' customers. On all points, therefore, MacKinnon J. was right, and accordingly the appeal fails and must be dismissed with costs.

ATKIN L.J. I agree with the judgment of MacKinnon J. and with that which has just been delivered by my Lord, but, in deference to the sustained and interesting argument of Mr. Pritt, I will add a few words giving my reasons for the dismissal of this appeal.

The appellants drew cheques in favour of the foreign sellers to them of goods and sent the cheques over to their own agent, a man Schultze, with instructions to hand the cheques to the foreign sellers. Schultze stole the cheques, forged the indorsements and paid the cheques into his own account in the Oscar Heilmann bank; and when the cheques came forward they were collected by the respondents for the German bank. There can be no doubt therefore that the respondents converted the cheques, which were in fact the property of the plaintiffs. But the question is, whether or not the respondents bring themselves within the protection of s. 82 of the Bills of Exchange Act, 1882. The onus of bringing themselves within the section, I think, rests upon them, and they have to show that they, in good faith and without negligence, received payment for a customer of a crossed cheque. That, of course, must depend partly upon the facts, and the facts in this case were partly admitted and partly proved by evidence. The evidence which was given was that of some of the respondents' officials and other bank officials. As not uncommonly happens, these witnesses were fairly easy victims in cross-examination, but I do not think that the witnesses succeeded in giving away their case altogether, though Mr. Pritt urges upon us that they did.

The first question is whether or not the respondents received this money, because that is one of the essentials in the section. Mr. Pritt succeeded in inducing the principal official of the respondents to concede that there was a difference between a collecting bank and a receiving bank and that the respondents were not the receiving bank. Accordingly, Mr. Pritt contended that he had proved out of their own mouth that the respondents did not receive this money. I think, however, that he was too successful there. I think the witness was using a phrase merely with the view of distinguishing between the bank which initially received the cheque and the bank that, in fact, put it forward for payment. Notwithstanding that distinction I think that it cannot be disputed that the respondents received the money from the paying bank; they received it in the course of collecting it. It was then said that the respondents had not shown that they received the money without negligence. Mr. Pritt contended in the first place that these cheques were drawn marked, "Account payee only," that the respondents paid no attention to that marking, that they did not investigate the question whether or not they were collecting for the account of the payee, and he pointed to the indorsement to which it is said they ought to have paid attention and which would have shown that they were not collecting the money for the account of the payee. What is the meaning of a cheque marked, "Account payee only"? I do not know any better statement of it than that made by Bigham J., a very great authority on questions of commercial, and particularly of banking practice, in *Akrokerri (Atlantic) Mines* v. *Economic Bank* (1), that "the paying bank has nothing to do with the application of the money after it has once been paid to the proper receiving banker. The words 'account A. B.' are a mere direction to the receiving bank as to how the money is to be dealt with after receipt." In this case, in considering the question of negligence, we must have regard to the particular facts and the parties upon whom the duty to take care is imposed. It is desirable to point out that the Bills of Exchange Act expressly provides that a crossed cheque can only be paid by the bank on whom it is drawn to a banker, or, if crossed specially, only to the banker to whom it is crossed; and it also expressly says that where a banker receives a cheque crossed specially he may cross it to another for collection: see ss. 77, 79, 80. Therefore, the position of a banker who receives a cheque in the ordinary course of business is well recognized by the Legislature. Everybody knows now that in the ordinary course of practice, in England at any rate, crossed cheques, certainly in the Metropolis, are cleared through the Clearing House, and there are only a limited number of banks—I think the number given in evidence was ten—which are what are called

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(1) [1904] 2 K. B. 465, 472.

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clearing banks, hence it follows that all the other banks in the country, if they desire to clear crossed cheques, have to send them to a clearing bank which is among those contemplated in the Bills of Exchange Act as the agents for collection. It was proved that the clearing bankers—and the respondents are clearing bankers—receive thousands of cheques daily for clearance through the Clearing House. That being the state of business which everybody must contemplate, it seems impossible that a very close and accurate survey of all the circumstances connected with each cheque can be expected from the clearing banker, whom I am now treating as the agent for collection. But Mr. Pritt succeeded in getting the representatives of the respondents to say that they were under no obligation to look at the cheques at all, except to see whether there was an indorsement to them, and whether that was in order. I do not think it necessary to accept that view. I think they have also to bear in mind that though clearing bankers have to handle large numbers of cheques, they are dealing with very valuable negotiable instruments representing enormous sums of money, and that they have some responsibility at any rate to the persons whose property those negotiable instruments really are, and if anything was noticed or was such that it ought to be noticed—if, for example, a cheque came into the hands of the clearing banker without a proper indorsement—the clearing banker might find himself in a difficulty if he sought to establish by his servant that he had no duty to look at it except to see whether there was an indorsement to him. That, however, is not this case. On the cheques in this case there is a complete set of indorsements, and the position of the clearing bank in respect of a cheque marked "Account payee only" may very well be this: as long as there are indorsements which are consistent with the bank which sends it forward holding it and being able to comply with the instructions thereon, that is sufficient. I am not dealing at the moment with what is meant in those circumstances by the words "Account payee only," or collection for a customer. All that it is necessary to say now is that the documents are such that it was quite possible, and indeed probable, that the official who scrutinized the indorsements would pass them if satisfied that the bank with whom he was dealing was in fact going to account for the proceeds to the payee mentioned on the face of the document, or otherwise comply with such directions. That seems to me to be sufficient. It is said that they must be satisfied that their principal, the bank which sent the cheque forward, must hold the account of the payee. I am not satisfied as to that, because one knows very well that cheques are occasionally drawn marked "Account payee" and sent to a person who has no banking account. I do not agree that those cheques are of no value to that person. I see no reason why such a person should not request some one who has a banking account to present and get the cheque cleared for him. I agree that there is a duty upon the bank which takes a cheque in those circumstances to see that, in fact, they are collecting the money for the account of the payee, and that the proceeds, when received, will go to the payee. But that seems to me to be entirely a different matter. In this case I think there is no evidence of negligence on that point.

It was suggested that there was evidence of negligence, because the indorsements in themselves, if looked at, should have aroused suspicion. As to that, it is only necessary to say that there is really nothing in these indorsements to attract the attention of a person who, as I say, has only the duty of doing that which is proper to a bank which has to collect thousands of cheques in the course of a day.

It was next contended that the cheques were not collected for a customer, and that the inference from the evidence was that the respondents were holders for value of the cheques. The evidence is that the Oscar Heilmann bank had what appears to be an ordinary drawing account with the respondents. It may be called by a different name in banking circles, because Oscar Heilmann is, in fact, a bank, but it was an account in which Oscar Heilmann sent cheques for collection and these were credited to the account of Oscar Heilmann, as a bank drawing upon the account, by the respondents. In every respect it seems to me that the account was an ordinary account. If that is so, and crossed cheques are sent to the respondents with a request to credit them to the account, prima facie the bank receiving and collecting them collects them for the customer, and does not become a holder of them for value. If it is sought to show by inference from the circumstances that the ordinary position has been altered in some way, it is, I think, for the appellants to prove what they seek to infer. There was no evidence in this case from which it can be inferred that the respondents were holders for value of the cheques and collected them in that capacity.

The remaining point was that Heilmanns being a bank could not be a "customer." In my opinion, on the evidence, they were customers in every sense of the word. They had a drawing account with the respondents. But if they were in a different position, it seems to me that if a non-clearing bank regularly employs a clearing bank to clear its cheques, the non-clearing bank is the "customer" of the clearing bank. A further point might well arise on the section, inasmuch as one knows that a non-clearing bank which has a customer in the ordinary sense—a lay customer—to use Mr. Pritt's expression, can and must employ a clearing bank as its agent for collection if the cheque is to be cleared through the Clearing House. It may very well be that the agent for collection collects for a customer when the cheque is collected for the benefit of the customer of the non-clearing bank. But that point has not been argued, and it is not necessary to decide it.

In this case it seems to me that the evidence supports the finding of MacKinnon J. in every respect, and, therefore, I agree that the appeal should be dismissed with costs.

LAWRENCE L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for appellants: *Buckeridge & Braune.*
Solicitors for respondents: *Travers-Smith, Braithwaite & Co.*

J. S. H.

stinguished.– ASKEY v. GOLDEN
NE Co., LTD. [1948] 2 All E.R. 35.

JAMES *v.* BRITISH GENERAL INSURANCE COMPANY, LIMITED.

1927
March 21, 22.

[1926. J. 1793.]

Insurance (Accident)—Motor Car—Indemnity against Liability for accidental bodily Injury to third Parties—Driver Drunk and driving to Danger of Public—Collision—Third Party killed—Driver convicted of Manslaughter—Right to Indemnity—Public Policy.

A policy of insurance provided that the insurance company would indemnify the assured against all sums which he might be legally liable to pay for damages or compensation to any person for accidental bodily injury or accidental damage to property where such injury or damage was caused by the driving of the insured's motor car, including law costs when incurred with the consent of the company. While the insured was driving his motor car a collision took place between it and a motor cycle, the result being that the driver of the latter vehicle was injured, a passenger thereon was killed, and both vehicles were damaged. At the time of the collision the insured was drunk through his own unpremeditated folly. The insured was convicted of the manslaughter of the deceased passenger. The injured driver brought an action for personal injuries against the insured, in which he was awarded damages and costs, and the insured incurred costs. The insured also incurred costs in repairing the vehicles, in attending an inquest on the deceased, and in defending himself in the police court proceedings before his trial. In an action by the insured against the company for indemnity against these damages and costs:—

Held, that the policy covered liabilities of the insured for accidental bodily injury to any person or accidental damage to property caused by his negligence, even though gross and attended by criminal consequences, that the policy by covering these liabilities was not void as against public policy, and that the insured was entitled to the indemnity which he claimed.

Tinline v. *White Cross Insurance Association* [1921] 3 K. B. 327 followed.

Burrows v. *Rhodes* [1899] 1 Q. B. 816, 828 observations of Kennedy J. adopted.

O'Hearn v. *Yorkshire Insurance Co.* (1921) 50 Ont. L. R. 377; 51 Ont. L. R. 130 considered and not applied.

ACTION tried by Roche J. without a jury.

By a policy of insurance, which recited that F. C. James, the plaintiff, had paid to the British General Insurance Co., Ld., the defendants, a specified premium, it was agreed, among other things: (A) that the defendants would indemnify the plaintiff against all sums which he might be

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legally liable to pay for damages or compensation to any person, or in case of death to the relatives of any person for and in respect of accidental bodily injury to any such person where such injury was caused by the driving of any motor car described in the schedule thereto, including law costs, if any, payable in connection therewith when incurred with the consent of the defendants; (B) that the defendants would pay for or make good at their option any damage caused by accidental external and visible means to any motor car and accessories belonging to the insured and described in the schedule to the policy; and (C) that the defendants would at the plaintiff's request, or might at their own option, represent the plaintiff or his driver at any inquest or inquiry, and would undertake the defence in any police court proceedings in the United Kingdom in respect of any alleged offence by the plaintiff or such driver whilst using such vehicle, if any accident occurred which might be the subject of indemnity under the policy. The policy further provided that the due observance and fulfilment of the conditions thereof should be a condition precedent to any liability of the defendants thereunder, and among these conditions were the following: (5.) that the policy would be rendered void and all premiums forfeited to the defendants in the event of: (*a*) any omission of a material fact, or suppression, misrepresentation or misstatement of any fact in the proposal for the insurance; and (*c*) any loss occasioned by or through the procurement or connivance of the insured.

The motor car originally described in the schedule to the policy was a "Mathis" car, but for this there was substituted by indorsement on the policy a "Standard" car, and afterwards as from May 29, 1925, there was substituted by further indorsement a "Fiat" car. The last mentioned car was registered in the name of the plaintiff's father.

On June 3, 1925, during the currency of the policy, while the plaintiff was driving the insured "Fiat" car, a collision took place between it and a motor bicycle driven by an army subaltern named Shadwell and carrying another subaltern named Tait as a passenger, in consequence of which collision Shadwell was injured and Tait was killed, and the motor car and motor bicycle were damaged. The plaintiff paid for the repairs to these vehicles.

Shadwell brought a civil action for damages for personal injuries against the present plaintiff, in which he recovered damages and costs, and the present plaintiff incurred costs. The present plaintiff could not pay the damages and costs recovered by Shadwell unless he had recourse against the present defendants.

An inquest was held upon Tait, and the plaintiff incurred costs in attending it.

The plaintiff was charged with the manslaughter of Tait and the unlawful wounding of Shadwell, and proceedings took place against him at the Salisbury police court, and at the Wiltshire assizes, where he was convicted on the former charge and sentenced to twelve months' imprisonment, and in respect of all these proceedings he incurred costs. The charge relating to Shadwell was not further proceeded with, the indictment for that charge remaining on the file and there being no conviction thereon. It was proved at the trial that the plaintiff had been at a wedding where he had taken too much to drink, and that he was not in a sober condition when the accident happened.

The defendants declined to indemnify the plaintiff against any of the above mentioned expenses and costs.

On July 15, 1926, the plaintiff accordingly brought the present action against the defendants upon the policy, claiming indemnity against these expenses and costs. The plaintiff alleged in his statement of claim that by the said policy the defendants undertook to indemnify him against the damages and costs therein mentioned; that the said collision took place during the currency of the policy; that as the result of the collision the plaintiff had paid or become liable to pay the following sums: 83*l*. 4*s*. 9*d*., the estimated cost of repairs to the two vehicles, 1500*l*. damages recovered by Shadwell in his civil action against the present plaintiff, 182*l*. 7*s*. 7*d*., costs recovered by Shadwell in that action, 69*l.* 14*s.* 4*d.*, costs incurred by the present plaintiff in that action, 21*l.* 18*s.* 3*d.*, costs incurred by the plaintiff at the inquest on Tait, and 252*l.* 5*s.*, costs incurred by the plaintiff in the criminal proceedings against him at the police court and at the assizes; that the defendants were liable under the policy to indemnify the plaintiff against these sums; that they had refused to be bound by the policy and/or had repudiated the same; and that the plaintiff claimed as damages the total of the above amounts—namely, the sum of 2109*l.* 9*s.* 11*d.*

The defendants in their defence stated, among other things (para. 3), that the said death, injuries and damage, if any, were directly caused owing to the fact that the plaintiff at the time of the collision, if any, was in the course of committing criminal acts, the particulars being that the plaintiff at the time in question was drunk and was driving a motor car to the danger of the public, with the result that he caused the death, injuries and damage alleged; (para. 4) that by reason of these matters the plaintiff created a risk which was never in the contemplation of the parties, or alternatively voluntarily increased the risk which the defendants bore under the policy, and the death, injuries and damage were directly attributable to such risk or increased risk; (para. 5) that the defendants further denied that the said death, injuries or damage was or were accidental within the meaning of the policy; (para. 6) that if and so far as the policy could be held to constitute an indemnity to the plaintiff against the consequences of his criminal acts as aforesaid the same was contrary to public policy and was void; (paras. 7, 8, 8a and 9) that in answer to question No. 8 in each of the proposal forms signed by the plaintiff, he stated that he was free from physical defect or infirmity, and further that he omitted to state that the Fiat car was the property of his father and not his own property, and withheld that information from the defendants, but further stated that that car was his own property; (para. 10) that the answers to question No. 8 were untrue in that for some years past the plaintiff had been troubled with heart trouble and giddiness, and further that

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the answers were not true or complete in every respect in that the fact that the Fiat car was not his property was information with which the defendants should have been acquainted; (para. 12) that by condition No. 5 of the policy the same was to be rendered void in the event of any omission of a material fact or suppression, misrepresentation or misstatement of any fact in the proposal forms; (para. 13) that the said answers to question No. 8 and the omission to state that the Fiat car was the property of the plaintiff's father and a statement by the plaintiff in a letter that it was his property constituted omissions of material facts and suppressions, misrepresentations and misstatements of facts which the plaintiff ought to have disclosed to the defendants; (para. 14) that in consequence of the matters set out in paras. 7 to 13 the policy became void and the defendants were not liable to the plaintiff in respect of the present claim; and (para. 15) alternatively the defendants said that: (i.) as to the item 83*l.* 4*s.* 9*d.* the Fiat car was not the property of the insured and the defendants were not in any event liable for that item; (ii.) as to the items 182*l.* 7*s.* 7*d.* and 69*l.* 14*s.* 4*d.*, these were not incurred with the consent of the defendants; (iii.) as to the item 11*l.* 8*s.* 3*d.* part of the item of 21*l.* 18*s.* 3*d.*, there was no request to the defendants to represent the plaintiff at the inquest; (iv.) as to the item of 252*l.* 5*s.* there was no liability upon the defendants under the policy.

At the trial of the action the shorthand notes of the plaintiff's trial for manslaughter were by consent of the parties put in evidence, and from these it appeared that shortly before the accident the plaintiff had been at a wedding, where he had had too much to drink, and that at the time of the accident he was drunk.

On behalf of the defendants evidence was given with a view to showing that the Fiat car had been bought with money belonging to the plaintiff's father and was not the property of the plaintiff but of his father; and that the statement made by the plaintiff in the proposal forms for the policy to the effect that he was free from physical defect or infirmity, was in fact untrue.

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On behalf of the plaintiff evidence was given to show that the money with which the Fiat car was bought was given to the plaintiff by his father in order that he might therewith buy that car as his own; and that at the time when the plaintiff signed the proposal forms for the policy he was free from physical defect or infirmity.

du Parcq K.C. and *Malcolm Hilbery* for the plaintiff. The plaintiff is entitled to be indemnified by the defendants against the damages and costs incurred by him as the result of the accident. The accident was no doubt occasioned by the negligence of the plaintiff, which may have been gross and had consequences leading to his conviction for manslaughter. The policy of insurance covers the plaintiff's liability for damages and costs for accidental injury or damage caused by the driving of his car through his negligence, even though gross and followed by criminal consequences. The contract of insurance is not void as against public policy by reason of its indemnifying the plaintiff against liability of that description. It may be that a contract to indemnify a person against liability resulting from his intentional doing of an act which is manifestly unlawful or which he knows to be unlawful is void as against public policy, and cannot be enforced by action: per Kennedy J. in *Burrows* v. *Rhodes* (1); see also *Merryweather* v. *Nixan* (2); *Adamson* v. *Jarvis* (3); *Betts* v. *Gibbins* (4); and *Colburn* v. *Patmore.* (5) A contract is not however void as against public policy in so far as it indemnifies a person against liability resulting from his doing of an act by negligence, even though attended by criminal consequences. That proposition is supported by *Tinline* v. *White Cross Insurance Association* (6), where it was held on facts very similar to those of the present case that the insured had a right to recover on the policy notwithstanding that his negligent driving of the car had caused the death of a person and had led to his conviction for

(1) [1899] 1 Q. B. 816, 828.
(2) (1799) 8 T. R. 186.
(3) (1827) 4 Bing. 66, 73.
(4) (1834) 2 Ad. & E. 57.
(5) (1834) 1 C. M. & R. 73.
(6) [1921] 3 K. B. 327.

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manslaughter. The fact that in the present case the plaintiff was drunk is immaterial, because even though his drunkenness was wholly or in part the cause of the accident it was not wilful and deliberate, but only careless and foolish. If the accident had not caused the death of a person the defendants could not have disputed their liability on the policy, and they cannot more successfully dispute it because the accident had fatal consequences.

Barrington-Ward K.C. and *R. T. Monier-Williams* for the defendants. The plaintiff has no right to an indemnity against the expenses and costs for which he alleges that he became liable for injury and damage caused by the driving of his motor car on the occasion in question. On that occasion the plaintiff was driving the car when drunk, and by doing so he committed the crime of manslaughter. He deliberately and intentionally became drunk and drove the car when drunk, and he thereby committed that offence. He was therefore deliberately and intentionally doing wrongful acts. The policy of insurance does not indemnify the plaintiff against liability for the consequences of wrongful acts deliberately and intentionally done by him. If it purports to indemnify him against the consequences of acts of that kind it is void, as being contrary to public policy: *Colburn* v. *Patmore* (1); *Shackell* v. *Rosier* (2); *Fitzgerald* v. *Leonard* (3); *Thompson* v. *Hopper* (4); *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (5); *Burrows* v. *Rhodes* (6); *Leslie* (*R.*), *Ld.* v. *Reliable Advertising, etc., Agency* (7); and *Weld-Blundell* v. *Stephens.* (8) The present case is distinguishable from that of *Tinline* v. *White Cross Insurance Association, Ld.* (9), because here the wrongful acts of the plaintiff were not the result of negligence, but of deliberation and intention.

Hilbery replied.

(1) 1 C. M. & R. 73.
(2) (1836) 2 Bing. (N. C.) 634.
(3) (1893) 32 L. R. Ir. 675.
(4) (1858) E. B. & E. 1038, 1049.
(5) [1898] 2 Q. B. 114.
(6) [1899] 1 Q. B. 816, 828.
(7) [1915] 1 K. B. 652.
(8) [1919] 1 K. B. 520.
(9) [1921] 3 K. B. 327.

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ROCHE J. The plaintiff in this action sues to recover certain moneys on a policy of insurance underwritten by the defendants, whereby the plaintiff was insured in connection with his ownership and driving of a Fiat motor car, against a variety of matters, including what are known as third party risks, or, as the margin of the policy expresses it, "public liability." [His Lordship referred to the relevant clauses of the policy of insurance, stated the facts of the case at length, and continued as follows:] The plaintiff brought the action on the insurance policy to recover indemnity in respect of his liability for payments by reason of an accident which happened while he was driving his car. The main defence, which raises questions of general interest and importance, and is not without difficulty, is that inasmuch as the plaintiff was guilty of a crime in connection with this accident and the accident resulted from criminal conduct on his part, it is against public policy that he should be indemnified in respect of it. I will deal with that main defence after I have disposed of certain other defences which are raised.

The first of these other defences is that raised by paras. 7, 8a and 9 of the amended statement of defence. It is said that the plaintiff was not the owner of the Fiat car which was covered by the policy, and that there was in respect of the matter of ownership a misstatement and a concealment of the facts, which by the express terms of the policy rendered it void. The answer to that defence depends in my view on the facts disclosed by the evidence. I have heard the plaintiff and his father and, broadly speaking, I accept their evidence. The position, as I find it, is this: When the plaintiff came to acquire the Fiat car he had not all the necessary money, so he obtained a sum of money from his father. The plaintiff says that that sum was given to him by his father. Whether it was a gift out and out or an advance, it is not necessary for me to determine, but I find that it was put at the disposition of the plaintiff for the purpose of enabling him to purchase the Fiat car, with the intention and on the terms that it was to be the plaintiff's very own. The point taken against that conclusion was that the Fiat car was registered in the name of the father and not of the plaintiff. That was so, but there is nothing in the Motor Car Acts or the Schedule thereto to say that a motor is to be registered in the name of the owner. Not infrequently, a car is not so registered, and I find on the evidence that in this case the registration in the father's name was for some family reasons, or because it was considered wise that the father, as he had advanced the money, should have some control in regard to the sale of the car. To that extent only had the father any interest in the matter. At best and at most, his right was that of a lender of money, and not that of an owner of the car. I accept the plaintiff's evidence on this point. I find that the car was the plaintiff's own in the sense that he was the legal owner of it and was the person entitled to the use and possession of the car. It therefore becomes unnecessary to consider the point raised by the plaintiff in reply to that defence—namely, whether the ownership and the representation of ownership are material or not.

As to the allegation that the plaintiff made untrue answers to a question in the proposal, when he said that he was free from physical defects and infirmities in January, 1924, I find as a fact that the plaintiff was at that date free from any physical defect or infirmity.

That disposes of all the defences which go to the whole action, except the defence of public policy. There are, however, one or two matters of amount which I have to mention. As to the claim for 252*l*. 5*s*. in respect of the costs of the defence in the criminal proceedings at the Wiltshire assizes, I hold that that sum is not recoverable. The answer to that claim is that there is no clause of the policy whereby the company undertook to indemnify the assured in respect of those costs. As to the items amounting to 21*l*. 18*s*. 3*d*. in respect of the costs incurred at the inquest and in the police court, it is not contended, on behalf of the defendants, that if the plaintiff is right generally, those sums cannot be recovered. They can be recovered under section (C) of the policy, or by way of damages, because the company, taking the view that no indemnity was due and that no obligation arose to defend the plaintiff in the police court, refused to do so. If the plaintiff recovers generally, he recovers those items of 21*l*. 18*s*. 3*d*. One other item of amount arises. It is said that the plaintiff ought not to recover the costs incurred in defending the civil action brought against him by Shadwell, because it would have been better to admit liability and go to the sheriff's court as to damages. Having regard to the course of the proceedings, I am unable to take that view. Notice was in fact given considerably before the time of the trial of that action that liability would not be further contested therein, and the trial proceeded on the basis of assessing damages. Having regard to the gravity of the case I am satisfied that nothing unreasonable was done by the advisers of the now plaintiff in these matters, and I hold that these costs were properly and reasonably incurred. As to the costs of repairs to the assured's damaged motor car these follow the general result of the case, it being once established in accordance with my finding that the motor car was the property of the assured.

It remains to deal with the defence of public policy. That, I think, raises a question of general importance, because if the contention of the present defendants is right it cuts at the root of a very large number of these motor insurances. I see no ground for asserting a principle of public policy which operates only against persons who drive when they are drunk. As I have suggested to counsel for the defendants during the course of his argument, the principle, if it is applicable at all, seems to be applicable to all persons who drive to the public danger. Moreover the principle affects many other cases besides those of motor insurance. It affects a very large number of workmen's compensation insurances where workmen are injured by acts or defaults, even though inadvertent on the part of the employers, which amount to breaches of the Factory Acts, such as neglect in the fencing of machinery and things of that sort. If the principle be right, that the mere fact that the assured has offended against the criminal law, however inadvertently, precludes him from recovering under a policy of indemnity, then indeed the results are very far reaching. Fortunately for myself the application of the principle in cases of this particular description has been the subject of express decision by a judge of great experience in matters of insurance law: Bailhache J., in *Tinline* v. *White Cross Insurance Association* (1), to which I will refer again presently.

In cases such as this, in which considerations of public policy arise, the rights and duties of judges are clear. They have to attend to matters of public policy. Any dispute about that, and there was apparently some dispute about it as late as 1853, was set at rest by the well known case of *Egerton* v. *Earl Brownlow* (2), where it was established that it is the duty and the right of the Courts to refuse to enforce contracts or dispositions of property which are offensive and obnoxious to public policy. It is also true that long before the decision in that case that principle had been applied to matters of insurance.

The principle was stated by Lord Esher M.R. in *Cleaver* v. *Mutual Reserve Fund Life Association* (3) as follows: "No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity; but," he adds, "when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires." For that, among other reasons, I agree that this principle should not be carried a step further than public policy requires. In other words, the Courts are reluctant to interfere with contracts unless it is plain that their enforcement is contrary to public policy.

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(1) [1921] 3 K. B. 327.

(2) (1853) 4 H. L. C. 1.

(3) [1892] 1 Q. B. 147, 151.

It may further be stated that the circumstances in which public policy is applicable are of course subject to variation. The principles of public policy, which I suppose are only a branch of the principles of ethics, are themselves unchanging, but their applications may be infinitely various from time to time and from place to place. That, I think, was what Bailhache J. was properly referring to when in *Tinline's* case (1) he said: "Lord Halsbury said that the law is not always logical, and every one concerned with the administration of the law knows this. If the law is not logical, public policy is even less logical." I prefer, however, to say that the applications of public policy may be variable from time to time and from place to place. Nevertheless if it is found at any time that the Courts have adopted a settled rule for the application of public policy in any sphere, then I think it is the duty of the judges loyally to follow that rule.

The cases dealing with the application of the doctrine of public policy to contracts in restraint of trade as between employer and employed are very familiar, and in regard to them a more or less settled rule has been established. In this case without finding so generally settled a rule as in the case of employer and employed. I find in *Tinline's* case (1) a definite decision of Bailhache J. dealing with this very matter. I think without doubt that I ought to follow that decision, because it is clear and unambiguous, and I follow it with the more confidence, if not with more loyalty, because I agree with it. It has been said that this case is distinguishable from *Tinline's* case. (1) I am unable to distinguish the two cases. I think I can express at one and the same time shortly my reason for saying that I am unable to distinguish the two cases, and also my reason for saying that I agree with the decision in *Tinline's* case (1), dealing with them.

The principle as applicable to contracts of indemnity seems to me to stand thus: In the case of *Burrows* v. *Rhodes* (2) Kennedy J. (as he then was) said in a passage

(1) [1921] 3 K. B. 327.

(2) [1899] 1 Q. B. 816, 828.

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that has been often quoted: "It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void." The learned judge applying that rule in the case before him held that the plaintiff had a right to indemnity from the defendant, or damages, which was the effective remedy, on the ground that, although the plaintiff might have done—as was alleged in the pleadings—that which was unlawful, yet he did not do it in circumstances which made it to him manifestly unlawful, or in which he knew it to be unlawful. That, I think, is a fair paraphrase of the decision in that case, which was the decision of a Divisional Court, consisting of Kennedy and Grantham JJ. That is the principle which Bailhache J. applied in *Tinline's* case (1), and in my judgment it is the principle which is applicable to this case. In other words, the act which brought about the criminal responsibility both in *Tinline's* case (1) and in this case, and which brought about the civil responsibility in both cases, was done by negligence. It was gross negligence or reckless negligence, negligence of the kind which constitutes criminality; but nevertheless it was negligence, and was not the wilful or advertent doing of the act. In such circumstances as these there is not, in my view, on the part of the person who does the act, that degree of criminality which in the doing of a known unlawful act makes it against public policy that the perpetrator should be indemnified in respect of it.

With regard to the distinction taken between this case and *Tinline's* case (1) on the ground that the drunkenness of the plaintiff in this case involved a degree of deliberation or intention which was not present in *Tinline's* case (1), the argument at one time almost seemed to touch on the degree of moral culpability attaching in the respective

(1) [1921] 3 K. B. 327.

cases, but in reality it was directed rather to legal considerations. As to culpability—while I must not be thought to be defending or excusing the conduct of the plaintiff or of any person in his situation—I find it difficult to think that he was any worse than a person who in his sober senses drives with reckless disregard of the lives and limbs of other people. I find it hard to discriminate between the moral culpability of the one class of persons and the other. As regards legal liability it appears to me that they are in the same position. They are ex hypothesi both alike guilty of criminal negligence, for which they are answerable in a criminal Court, whether for doing actual bodily harm or for manslaughter. In neither case have they in fact intended the injury to life and limb for which they are tried and convicted. They have in each case been guilty of negligence, which is inadvertent and not wilful or intentional, so as to inflict bodily harm.

It remains to mention that there has been brought to my attention—and counsel on both sides have much assisted me—a case in Ontario, in which the decision of Bailhache J. in *Tinline's* case (1) was considered and dealt with, but not followed. The case is *O'Hearn* v. *Yorkshire Insurance Co.* (2) It was sought in that case to distinguish *Tinline's* case (1) on the ground that there were statutory provisions as to the law of driving in Ontario that are not present in England. I think that was a mistake, because the Canadian enactment seems, except as to the extent of punishment available, to be very like our own Act with regard to dangerous driving. It is sufficient, however, to make two observations. The first is, that I must not by any means be taken as saying that the decision of the Ontario Court is wrong. It may well be that the considerations of public policy in Ontario are different from those entertained here. Secondly, in my view, there is nothing in the reasoning of that Court which alters or even detracts from my opinion that Bailhache J.'s decision is correct. The decision in *O'Hearn's* case (2), I think, does amount to this, or, if it were followed in England, would lead to this conclusion, that in no case where a person was guilty of driving to the public danger and so was guilty of an infraction of the criminal law applicable to these matters, could he recover any indemnity.

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(1) [1921] 3 K. B. 327. (2) 50 Ont. L. R. 377; 51 Ont. L. R. 130.

For these reasons I hold that this case is not distinguishable from *Tinline's* case (1), and for these reasons also in my opinion Bailhache J.'s decision was right in principle.

Before leaving this part of the case, I want to express one more conclusion as to the facts. It is said that the plaintiff in this case deliberately put himself in the condition of drunkenness, and deliberately put himself into the position of driving a motor car whilst drunk. On the facts I do not reach that conclusion. He arrived at that condition, I am satisfied on the shorthand notes, by reason of folly and not premeditation.

For the reasons I have given I follow the decision in *Tinline's* case (1), and it results from that that I give judgment for the plaintiff for 1857*l*. 4*s*. 11*d*. with the costs of the action.

Judgment for plaintiff accordingly.

Solicitors for plaintiff: *Blundell, Baker & Co., for J. M. B. Turner & Co., Bournemouth.*

Solicitors for defendants: *Clifford, Turner, Hopton & Lawrence.*

(1) [1921] 3 K. B. 327.

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[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

ORMOND INVESTMENT COMPANY, LIMITED *v.* F. BETTS (INSPECTOR OF TAXES).

Revenue—Income Tax—Foreign Possessions—Holding for less than three Years—Basis of Assessment—Interpretation of Statute by subsequent Legislation—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V., Rules applicable to Case V., r.* 1—*Finance Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 21), *s.* 26.

Rule 1 of the rules applicable to Case V. of Sch. D of the Income Tax Act, 1918, provides that tax in respect of income from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years "as directed in Case I." Where income so arising had been received during a less period so that an average of three preceding years was not available as the basis of computation:—

Held, by Rowlatt J. (1.), that the words "as directed in Case I." referred to the Rule applicable to Case I., which provided no other basis of computation than a three years' average, and did not refer to the Rules applicable to Cases I. and II. of Sch. D, which provided a basis of computation for a less period; and (2.) that there being no ambiguity in the above words, there was no necessity to resort to subsequent legislation—namely, s. 26 of the Finance Act, 1924—to explain their meaning.

Held, by the Court of Appeal, that the words "as directed in Case I." referred to the Rules applicable to Cases I. and II., as well as to the Rule applicable to Case I., and provided a basis of computation when the income had been received during a less period than the three preceding years.

Per Lord Hanworth M.R. While there was no necessity to rely upon s. 26 of the Finance Act, 1924, as an interpretation of the earlier Act, that section afforded a recognition and assertion of the conclusion to which the Court had come.

Per Sargant and Lawrence L.JJ. There was an ambiguity involving a difficulty of interpretation, and s. 26 of the Finance Act, 1924, might be looked at to see what was the proper and true construction to be placed upon the earlier Act.

Decision of Rowlatt J. reversed.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on March 6, 1925, the Ormond Investment Co., Ld. (called herein "the appellants"), appealed against assessments to income tax in the sums of 859,596*l.* and 1,031,372*l.* for the years ending April 5, 1923, and April 5, 1924, respectively, made under Case V. of Sch. D of the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40).

The appellants were incorporated in June, 1922, and carried on the business of an investment company in Bradford. In August, 1922, they acquired a large holding of shares in Joseph Benn & Sons, a company incorporated and carrying on business in America. On December 7, 1922, the appellants received a dividend of 601,717*l.* on these shares. They received no further dividend thereon nor any other income from possessions out of the United Kingdom up to April 5, 1923. Dividends were declared by Joseph Benn & Sons not more often than once a year, and the dividend paid in December, 1922, was in fact a distribution of two years' profits. The appellants made up the accounts of their business for the period of seven months from June 7 to December 31, 1922. The assessments under appeal were computed by taking the income of 601,717*l.* shown in this seven months' account and multiplying it by $\frac{10}{7}$ to arrive at the income for the purpose of assessment for the year ending April 5, 1923 (the appellants having been in existence for ten months of that year), and by $\frac{1}{7}$ to arrive at the assessment for the year ending April 5, 1924.

The assessments were made in accordance with the provisions of r. 1 of the Rules applicable to Case V. of Sch. D to the Income Tax Act, 1918. (1) It was contended on

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(1) Income Tax Act, 1918, Sch. D. Rule applicable to Case I. of Sch. D: "The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Sch. A, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment."

Rules applicable to Cases I. and II. of Sch. D. Rule 1, sub-r. 2: "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has behalf of the appellants: (1.) That the words "as directed in Case I." in r. 1 of Case V. of Sch. D to the Income Tax Act, 1918, referred only to the Rule applicable to Case I. and did not refer to r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., and that this view was supported by a comparison of paras. vii. and xi. in Sch. V. to the Act. (2.) That accordingly under r. 1 of Case V. the assessments should be computed on the average of the amounts of income arising in the three preceding years, and that it was immaterial

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been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI."

Rules applicable to Case V., r. 1:—"The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in rule 1 of the rules applicable to Case IV., and the provisions of this Act, including those relating to the delivery of statements, shall apply accordingly."

Rules applicable to Case VI., r. 2: "The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the commissioners."

Fifth Schedule: "Statements, Lists, and Declarations. . . . . . vii. By or for every person carrying on any trade to be charged under Sch. D. The amount of the profits or gains thereof, upon a fair and just average of the three preceding years, or of such shorter period as the trade has been carried on. . . . ."

"xi. By every person entitled to or receiving income from possessions out of the United Kingdom to be charged under Sch. D. (1.) In the case of income from stocks, shares or rents, save as hereinafter mentioned, the full amount arising therefrom, on an average of the three preceding years, and the amount of every deduction of allowance claimed in respect thereof, together with the particulars of such deduction and the grounds for claiming such allowance."

Finance Act, 1924 (14 & 15 Geo. 5, c. 21), s. 26: "The following rule shall be added after Rule 3 of the Rules applicable to Case V. of Schedule D:—4. Where a person who has been charged with tax in respect of income from a possession out of the United Kingdom proves that the total amount of tax, computed in accordance with Rule 1 of the Rules applicable to Cases I. and II. of Schedule D, which was paid in respect of that income for the first three complete years of assessment during which he was the owner of the possession, exceeds the total amount which would have been paid if he had been assessed for each of those years on the actual amount of the income of each year, he shall be entitled to payment of the excess."

whether the appellant company was in existence during the whole of that period. (3.) That the assessment for the year 1922–23 should thus be computed on the average income for the three years ending April 5, 1922, and should therefore be reduced to nil, and the assessment for the year 1923–24 should be computed on the average income for the three years ending April 5, 1923, and should therefore be reduced to 200,572*l.* (the average of nil, nil and 601,717*l.*). (4.) That in any event, as the accounts for the seven months included a full year's income from possessions out of the United Kingdom, the assessments for each of the years should be reduced to 601,717*l.*, the amount of the appellant company's income from this source for a full year.

It was contended by the inspector of taxes on behalf of the Crown (inter alia): (1.) That the words "as directed in Case I." referred to r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., as well as to the Rule applicable to Case I., as approved by the Income Tax Act, 1842 (5 & 6 Vict. c. 35), in which both these rules formed part of the first rule of Case I., and also by s. 26 of the Finance Act, 1924. (2.) That the assessment for the year 1922–23 was properly made according to the Rules applicable to Case VI., but that as no further income from this source arose up to April 5, 1923, it should be reduced to the sum of 601,717*l.*, the amount arising from June, 1922, to April 5, 1923. (3.) That the assessment for the year 1923–24 was properly made according to the provisions of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D, but should be reduced to 601,717*l.*

The Commissioners were of opinion that r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. must be regarded as much a rule of Case I. as the rule applicable to Case I. only, and that it was imported into Case V. no less than the similar direction in the proviso to r. 1 of Case I. of the Income Tax Act, 1842. They accordingly held that the assessment for the year 1922–23 was correctly made on the basis of the rules of Case VI., but that it should be reduced to 601,717*l.*, the full amount of the income arising up to April 5, 1923. They further held that the assessment for the year 1923–24 should be based on the average of the income arising up to April 5, 1923, but that it should also be reduced to the sum of 601,717*l*., that being the amount of the income arising from this source for a full period of twelve months. The appellants required the Commissioners to state a case pursuant to s. 149 of the Income Tax Act, 1918.

The question for the opinion of the Court was whether the assessment to income tax under Case V. of Sch. D for the years 1922–23 and 1923–24, should be computed as directed in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D.

Latter K.C. and *Bremner* for the appellants.

Sir D. Hogg A.-G. and *R. P. Hills* for the Crown.

ROWLATT J. In this case the question is whether, in assessing a taxpayer in respect of income from foreign possessions, it is open to the Crown to take advantage of the Rules applicable to Cases I. and II. of Sch. D to the Income Tax Act, 1918, r. 1, sub-r. 2, so as to enable it to make a computation arrived at on the average receipts of less than three years or of the year of assessment. That depends upon whether the words of r. 1 of Case V. "on an average of the three preceding years, as directed in Case I.," incorporate the "Rules applicable to Cases I. and II." in the Schedule, as to the computation to be made when, as in the present case, there is not an average of three preceding years available. Nothing turns on the form in which the Rules are printed. In the Income Tax Act, 1842 (5 & 6 Vict. c. 35), the provision for dealing with the case where a trade had not been set up or commenced for the three years before the year of assessment, having been set up within the three years or since the beginning of the year of assessment, took the form of provisos (1) in the sense that they modified the preceding part of the rule. They were in fact substantive enactments dealing with a part of the field not touched upon by what had gone before. In that form they more artistically appear in the Act of 1918. Therefore the

(1) Income Tax Act, 1842, s. 100, Sch. D, First Case, r. 1.

question is whether in saying in r. 1 of Case V. that the computation is to be made "on an average of the three preceding years, as directed in Case I.," the legislature is also saying that under certain circumstances, where the average of three years cannot be applied, a different computation is to be used under the Rules applicable to Cases I. and II.—namely, an average for less than three years in one case or an average not relating to any preceding years at all but to the actual year of assessment on the other.

It seems to me that the words of Case V., r. 1, are insufficient to produce the latter result. The only words used are "on an average of the three preceding years." Those words do not bring in any such further words as "together with the different provisions which are made to meet the case where there is not an average of three preceding years." Of course the matter does not stop there, because the contrast between the bases of calculation under the Rules applicable to Cases I. and II. and that under the Rule applicable to Case I. is clearly marked in the statutory returns to be made, forms of which under the Act of 1842 are to be found in Sch. G, No. vii., which is the return to be made "By or for every person carrying on any trade, manufacture, adventure, or concern in the nature of trade. . . . . The amount of the balance of the profits thereof, upon a fair and just average of three years, or for such shorter period as the concern has been carried on." While by No. xi., "By every person receiving in Great Britain profits from possessions out of Great Britain. . . . . The . . . . amount . . . . on an average of the three preceding years," and nothing more. And it is curious to note that in the forms at present in use which are sent out for the taxpayer to comply with, he is told in the notes that in regard to a trade or business he is to take the three years' average if the trade or business has existed so long, and if it has not that he is to take a period of less than three years or make a computation upon the profits during the actual year of assessment if the trade has been commenced in that year. But with regard to foreign possessions nothing is said in the notes, except that the return is to be on the basis of the average of the three preceding years, and for the case where he cannot do that by reason of the fact that he has not been in receipt of the profits for so long a period no provision is made by the form. It is to be remembered that at the time when the Act of 1842 was passed, as has often been said before, the foreign possessions to be considered were foreign undertakings, mostly plantations in the West Indies. Foreign shares, even if they existed at all, were negligible, and it is only within the last thirty years that the question, which first arose in *Bartholomay Brewing Co. (of Rochester), Ld.* v. *Wyatt* (1), was decided, whether in a particular return a foreign share was a foreign security or a foreign possession. If one looks at s. 108 of the Act of 1842 one sees how these remittances were to be assessed, and it clearly shows what was being dealt with at that time.

If the view is right that the two provisos to the first rule of Case I. in the Act of 1842 and in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of the Act of 1918 are to be applied to foreign possessions, one has in some way to transmute the language applicable to a trade set up and commenced into language which is applicable to foreign possessions. How is that to be done ? Is one to treat the foreign possession as being like a trade, and to look at the time when the foreign possession was set up and commenced ? Does that mean the time when the taxpayer acquired it ? If so, that means that there must be a separate calculation with regard to every piece of foreign property that he has. If he has land and buys another piece of land, is the other piece a new piece of land ? If he has land that is waste land and he develops it, is that a new possession or an old possession ? It seems to me that that is not the scheme of the legislature at all, but that what is looked at are the receipts. That was all the legislature had to go upon through the commissioners at the ports of London, Bristol, Liverpool and Glasgow, referred to in s. 108 of the Act of 1842. Can one treat the beginning of the receipts as the setting up and commencement of something ? I do not think that the words are applicable to that state of things at all. To put this construction on the Act of 1918 is to ask the Court to undertake the drafting of a provision to fill a hole left in the Act of 1842 and remaining in the Act of 1918, the stopping of which in 1842 would probably have required means too elaborate to make it worth the while of those who drafted the Act of 1842 under very different commercial circumstances.

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(1) [1893] 2 Q. B. 499.

But now I am confronted with a very difficult question as to the effect of subsequent legislation, because in 1924 s. 26 of the Finance Act, 1924 (14 & 15 Geo. 5, c. 21), was passed, and that section gave relief from taxation which it assumed to have been previously imposed, for it enacts "Where a person who has been charged with tax in respect of income from a possession out of the United Kingdom proves that the total amount of tax, computed in accordance with Rule 1 of the Rules applicable to Cases I. and II. of Schedule D" and so on, certain relief shall be given. This, it is contended, is a declaration by Parliament that the Rules applicable to Cases I. and II. are those contemplated by r. 1 of the Rules applicable to Case V., when it says "shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I." It is said that by s. 26 of the Act of 1924, in some way which it does not expressly state, the taxpayer had been declared to have been liable to assessment from the first moment when he was the owner of a foreign possession, treating the act of ownership, I suppose, as being the same as the setting up and commencement of a trade. Am I to give effect to that argument? It formulates what I may almost call a sinister and menacing proposition, because it means nothing less than this, that, on the assumption that I am right in my view of the sections, apart from the effect of s. 26 of the Act of 1924, Parliament has retrospectively by allusion taxed something which was not taxed at the time by previous legislation. I have been referred to the case of *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1), which came before me (2) and went to the Court of Appeal. (1)

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(1) [1921] 2 K. B. 403.

(2) [1921] 1 K. B. 64.

The Court of Appeal affirmed my decision, but did so upon the footing that the first Act, which it was suggested had been interpreted by the subsequent Act, was clearly ambiguous. Younger L.J. indeed held that the first Act secured to the Crown what it was contending for without any necessity of having recourse to the second Act. (1) No doubt therefore the first Act was ambiguous. Scrutton L.J. held that the second Act was the one applicable in that case, so that he does not deal with the question of interpretation by subsequent legislation. Lord Sterndale M.R. said—and when one thinks of it, he must be right—(2) "I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier." In *Attorney-General* v. *Clarkson* (3) a statute had been expounded by a case, and subsequently an Act of Parliament was passed which obviously recognized that the case had been well decided. That case really belongs to a different class from the one we are considering.

Upon the best consideration I can give to the case, I am unable to say that there is any ambiguity in the earlier Act, and that the ambiguity has been made clear by the later one. I think the position was correctly described by Mr. Latter for the appellants when he said that the revenue authorities had established in practice a certain principle of taxation, and that they then introduced the later Act to mitigate this principle, and so, it is suggested, obtained from Parliament a retrospective confirmation of that principle. It seems to me that to adopt the argument contended for by the Crown on this point is to go further than any case has gone before, and to go to a length which is rather alarming.

For these reasons I think the appeal must be dismissed with costs.

W. L. L. B.

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(1) [1921] 2 K. B. 421–2.

(2) [1921] 2 K. B. 414.

(3) [1900] 1 Q. B. 156.

The Crown appealed. The appeal was heard on February 1 and 2, 1927.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the appellant. The respondents say that only the rule applicable to Case I. is to be applied, and that so doing, the assessment is bad. But we submit that the construction is not confined to the application of that one rule, but that all the rules must be considered. On the question of construction, we contend that the Income Tax Act, 1918, was a consolidating Act and did not exceed the limits of consolidation: per Lord Wrenbury in *Great Western Ry. Co.* v. *Bater* (1); and, therefore, the provisos to r. 1 of the First Case in s. 100 of the Act of 1842 can be looked at and the meaning must be taken to be the same as in the Act of 1918, and if that Act is ambiguous then one can look at the Finance Act, 1924, s. 26; per Lindley M.R., in *Attorney-General* v. *Clarkson* (2); *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (3); *Furtado* v. *City of London Brewery Co.* (4)

Latter K.C. and *Bremner* for the respondents. The question is whether the direction in r. 1 of the rules applicable to Case V. includes some method of computation other than on an average of the three preceding years. The provisos to r. 1, Case I., Sch. D, of the Act of 1842 were really independent enactments, and should be so treated in the Act of 1918; per Sargant L.J. in *Betts* v. *Clare & Heyworth.* (5) All that is imported into Case V., r. 1, by the rule applicable to Case I. is the provision how the three years are to be ascertained. That measure of computation is not applicable to this case, and if there is no measure, there is no liability to tax. Where there is no income in the period in question there is nothing to compute: *Brown* v. *National Provident Institution* (6); *Whelan* v. *Henning.* (7)

Rule 1 of the rules applicable to Case V. is a plain enactment for taking the measure by an average of three years

(1) [1922] 2 A. C. 1, 31.
(2) [1900] 1 Q. B. 156, 164.
(3) [1921] 2 K. B. 403.
(4) [1914] 1 K. B. 152.
(5) [1926] 2 K. B. 289, 311.
(6) [1921] 2 A. C. 222.
(7) [1926] A. C. 293.

ending on a certain date. The appellant is asking for the application of a different measure, but there is no other provision in Case V. in the event of an average of three years not being available. The appellant seeks to incorporate r. 1, sub-r. 2, of the rules applicable to Cases I. and II., but that refers to a different thing—namely, the computation for a trade, profession or vocation where set up or commenced within a period of three years—and is not applicable to income arising from possessions out of the United Kingdom. Rule 1 applicable to Case V. is a clear direction to take Case I. and the rule applicable thereto as they stand. It is not permissible to look at s. 26 of the Finance Act, 1924, to construe the earlier statute, and incorporate r. 1, sub-r. 2, of the rules applicable to Cases I. and II., in order to ascertain the measure of computation where the three years' average is not available: *Watney, Combe, Reid & Co.* v. *Berners* (1); *Sheldrick* v. *South African Breweries, Ld.* (2); *Dore* v. *Gray* (3); *Ex parte Lloyd* (4); *Earl of Shrewsbury* v. *Scott* (5); Craies on Statute Law, 3rd ed., p. 135.

Attorney-General v. *Clarkson* (6) really turned upon the decision in *Attorney-General* v. *Fairley* (7), and in the *Cape Brandy* case (8) the Court was dealing with words in which there was no ambiguity, and that was not a decision in support of the appellant's proposition.

The presence of s. 26 in the Finance Act, 1924, cannot determine the construction of the earlier Act: per Vaughan Williams J. in *Attorney-General* v. *Wood.* (9) If the Legislature has omitted one instance then the taxpayer is entitled to escape: per Lord Sumner in *Inland Revenue Commissioners* v. *Fisher's Executors* (10); per Lord Cairns in *Partington* v. *Attorney-General.* (11)

Under the rules applicable to Case III., there is the alternative year, but there is no such provision for Case V. There is no ambiguity about Case V. or Case I., and if the words are read without any addition, they cannot apply to the respondents.

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(1) [1915] A. C. 885, 890.
(2) [1923] 1 K. B. 173, 184, 188.
(3) (1788) 2 T. R. 358.
(4) (1851) 1 Sim. (N. S.) 248.
(5) (1859) 6 C. B. (N. S.) 1, 180.
(6) [1900] 1 Q. B. 156.
(7) [1897] 1 Q. B. 698.
(8) [1921] 2 K. B. 403.
(9) [1897] 2 Q. B. 102, 110.
(10) [1926] A. C. 395, 412.
(11) (1869) L. R. 4 H. L. 100, 122.

R. P. Hills in reply.

Lord Hanworth M.R. This is an important case from the point of view of the subject and indeed of the Crown, but we have had the case fully and thoroughly well argued, and therefore I do not think that we should gain by reserving our judgment; rather will it be more convenient, while the matter is fresh in our minds, to deal with the issues which arise.

The facts on which the point has to be determined are these. The Ormond Investment Trust Co., Ld., is a company formed in June, 1922, incorporated under the Companies Acts. It carries on the business of an investment company in Bradford. In August in that same year it acquired a large holding of shares in a company incorporated to carry on business in America, and in the course of this same financial year—namely, on December 7, 1922—the appellant company received a dividend of 601,717*l.* on its holding of these shares. It received no further dividend on these shares or any other income from possessions out of the United Kingdom up to the close of the financial year on April 5, 1923, and it appears that this sum of 601,717*l.* was a dividend arising from a distribution of two years' profits.

The question that arises is this: Is the appellant company liable to assessment to income tax in respect of the sum which it has received from its foreign investment? The two years that are in question are the financial years which ended respectively on April 5, 1923, and April 5, 1924.

It is clear that the profit derived from foreign investments is comprehended as a subject for charge in the Income Tax Acts, but it is said, by reason of matters with which I will deal more particularly presently, that this company is not liable to pay anything to income tax for the financial year ending April 5, 1923, and that no assessment can be made upon it for that year; and that for the next year, the year ending April 5, 1924, a modified assessment can be made upon it.

Mr. Bremner has called our attention to the well known words which have been used in these income tax cases by many noted judges in the past. It is well always to bear them in mind, and I refer to the passage to which he called our attention, in order to show that in the judgment I am about to deliver I have not overlooked the words of Lord Cairns in *Partington* v. *Attorney-General* (1): "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be." Equally we must bear in mind the words of Cotton L.J. in *Gilbertson* v. *Fergusson* (2), following those words of Lord Cairns: "I quite agree we ought not to put a strained construction upon that section in order to make liable to taxation that which would not otherwise be liable, but I think it is now settled that in construing these revenue Acts, as well as other Acts, we ought to give a fair and reasonable construction, and not to lean in favour of one side or the other, on the ground that it is a tax imposed upon the subject, and therefore ought not to be enforced unless it comes clearly within the words."

As I pointed out, upon the facts it would appear that in the year of assessment, April, 1923, the appellant company were the holders of shares in this American company, and they received the large sum which I have already named from that holding in the course of that financial year. Inasmuch, therefore, as the Income Tax Acts imposed a liability on the receipts from foreign possessions, prima facie it would appear that there was in the hands of this company a receipt liable to taxation.

The Income Tax Acts are renewed from year to year. If an Income Tax Act is passed in any financial year it brings

(1) L. R. 4 H. L. 100, 122.

(2) (1881) 7 Q. B. D. 562, 572.

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into operation the permanent Act of 1918, for by s. 1 it is provided that: "Where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property, profits or gains respectively described or comprised in the schedules marked A, B, C, D and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules." It also provides, by s. 2, that: "Every assessment and charge to tax shall be made for a year commencing on the sixth day of April and ending on the following fifth day of April."

There was for the financial year ending April 5, 1923, a Finance Act passed which did impose an income tax. Thus the operation of the Income Tax Act of 1918 was started.

There is, therefore, at first sight a charge, because there was a holding and a receipt from that holding received in this country. I may therefore cast aside the principle of the cases which have been more than once referred to—such as *Brown* v. *National Provident Institution* (1), where the subject was not taxed, because in the year of assessment he did not hold a security which attracted tax. In that year of assessment there were no profits which were gained in that year, and all that was contended was that inasmuch as he had in a previous year held a security which yielded a profit, he was liable in that subsequent year to taxation. I clear away, therefore, those cases and the similar case of *Grainger* v. *Maxwell* (2), merely observing the distinction that in this case there was an investment held and there was a gain or profit received from that foreign investment in this country in that financial year. As there was an income tax in operation in that financial year, there is by s. 1 of the Act of 1918 a charge upon that gain or profit in that financial year. The mode by which that charge is to be made effectual is found in Sch. D, which says with regard to the tax under Sch. D, into which Schedule foreign investments or receipts from foreign possessions fall: "Tax under this Schedule shall be charged in respect of (*a*) the annual profits or gains arising

(1) [1921] 2 A. C. 222.

(2) [1926] 1 K. B. 430.

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or accruing: (i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere." It appears quite clear, therefore, that by virtue of the annual Act and the Act of 1918, s. 1, and the Schedule, there is a charge upon these profits accruing from a kind of property situate elsewhere than in the United Kingdom.

By cl. 2 of Sch. D: "Tax under this Schedule shall be charged under the following cases"—of which this particular one: "Tax in respect of income arising from possessions out of the United Kingdom," finds its place in Case V. So far, therefore, it appears plain that there is to be a tax which is charged in respect of this income arising from these foreign possessions.

The difficulty arises from the construction to be placed upon the rules which are applicable to Case V., but it is well to pause for a moment and see that, as far as I have gone at present, it is plain that there is a charge of the tax upon this income arising from possessions out of the United Kingdom imposed by the effect of the Acts to which I have already referred. How is that tax to be measured? Rule 1 of Case V. says this: "The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in r. 1 of the rules applicable to Case IV., and the provisions of this Act, including those relating to the delivery of statements, shall apply accordingly."

I am going to take the words of that rule first of all as if they did not contain the words "as directed in Case I." It is then said that the measure or computation of the tax to be paid is to be arrived at on the full amount on an average of the three preceding years. Speaking for myself, I find no difficulty in giving a clear interpretation to those words: "the three preceding years." What preceding years? The years which, as has been stated in s. 2 of the Act, are the years of assessment, that is the year which runs from April 6 in one year to April 5 in the following year, and you find definitely the indicative article there, "the three preceding years." It appears to me quite easy to give a definite meaning to those preceding years, and if you will read the sections of the Act and not trouble yourself with other portions of the Act referable to other cases and other businesses, it is easy to give a meaning to "the three preceding years" that are indicated—namely, three financial years.

But it is said that if that is the interpretation, then, as there was not a complete period of three preceding years before this year of assessment, if you compute it by looking at what the receipts were up to April 5, 1921, the total receipts were nil, therefore your computation based upon those three preceding years is nil, with the result that although there is a tax imposed, yet, as by the rules for computation you arrive at the answer nil, there is no sum to be recovered from this company.

With that form of reading and argument, if the rule applicable to Case I. stood as I have suggested, I would agree, but it does not. Rule 1 says the amount of the tax is to be computed "on the full amount thereof on an average of the three preceding years, as directed in Case I." Observe, it is not as directed in any particular rule to be found under Case I., nor does it narrow the matter down to a particular rule under Case I. It speaks of the computation of the tax "on an average of the three preceding years, as directed in Case I."

For my part, I cannot but accept the view that those words are intended referentially to bring in Case I. with its concomitants. I turn back, therefore, to Case I., and I find that cl. 2 in Sch. D, Case I., refers to "tax in respect of any trade not contained in any other Schedule," and that when you are dealing with Case I. or Case II. or Case III., you have to read the Cases, "subject to and in accordance with the rules applicable to the said Cases respectively." There is a rule, r. 1, which relates to Case I., and only to Case I., which does refer to the assessment on the basis of " a fair and just average of three years." To my mind the words of the rule applicable to Case V. are clear, and the reference to Case I. adds substantially nothing to what is indicated in r. 1 of the rules applicable to Case V.

But I find great difficulty in accepting the argument that what is meant by the words, " as directed in Case I.," is that you are to go to Case I. so far as Case I. and any rule under it may refer to three years and to nothing else. It is true that Case I. plus r. 1 applicable to Case I. refers to three years, but as I have already pointed out, you have " the three preceding years " already mentioned in r. 1 of Case V. More than that, you have referentially a direction that you are to go to Case I., from which there is no deduction and on which there is no restriction. Therefore when you come to Case I. it appears to me that you must read Case I. " subject to and in accordance with the rules applicable to the said Cases respectively."

What is the meaning of " respectively " ? Surely it means to distribute to the Cases such rules as are appropriate and belong to those Cases respectively. There are a number of rules which apply to Case I. and also to Case II., but the fact that they also apply to Case II. is relied upon to exclude them from notice when you are dealing with the rule which you are to follow in consequence of the words " as directed in Case I." which are found in r. 1 of Case V.

I cannot so restrict those words. It appears to me that, reading the word " respectively " in its right and proper sense, it does introduce for the purpose of consideration of Case I. all rules which are proper to Case I. If that is the right meaning, then one may expand the words of r. 1 of Case V. as directed in Case I., with the rules proper to that Case. If that is the way, as I think it is, in which that reference is to be read, then there is introduced not only the rule which is restricted to Case I. alone, but there are also the rules which are catalogued and are to be read in reference to Case I. as well as Case II., but not less to Case I., because they are applicable to Case II.

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When you turn to those rules which are applicable to Cases I. and II., you there find a scheme under which it is possible to form a computation of what the tax ought to be where you have a trade, profession, employment or vocation set up and commenced within the period of three years, and also where it has been set up and commenced within the year of assessment. Indeed, you have then introduced by your reference to Case I. a code which will apply and give you a method of computation in respect of all receipts which have been received not merely for three years and more, but which have been received for a less period of time, be that time two years or even so short a time as during the year of assessment.

I am not unmindful of the difficulties that you may have with regard to making use of rules which are primarily intended and directed to the setting up of trade or profession or employment or vocation, but which are in fact to be applied to the receipt of foreign possessions. In a number of cases in the Income Tax Act it is not easy to give a precise or perfect definition of what the words may or do mean, but many of these difficulties are overcome in the actual cases which have to be solved by determination of the facts. That determination of the facts is left to those who are entrusted with that duty, and who are not unacquainted with business, whether of trade or of the receipt of profits from foreign possessions.

I will only observe this, that by s. 237: " 'Trade' includes every trade, manufacture, adventure or concern in the nature of trade." For myself I am not much impressed by the argument that you must so strictly criticize the method of computation that if you find some difficulties or apparent difficulties in that method arising from what appear to be its terms, you are to hold as an alternative that the necessary result of those difficulties is that there is a freedom from taxation altogether, because the only computation which you ought to reach is nil.

Two other difficulties are suggested. It is said that if you will turn to Sch. A you will find that there is a definite provision for the computation of the tax, where a shorter period than that indicated in the Schedule is to be taken as the period over which an average is to be found. It is pointed out in the rules for estimating the value of certain lands, tenements, hereditaments or heritages which are not to be charged according to the general rule, that there are various measures over which you are to ascertain an average, sometimes three, sometimes five, sometimes seven years, and you will find under r. 8 that where the possession or interest commences within the period upon the basis of which the profits are to be computed, the profits of one year shall be estimated in proportion to the profits received, and so on. Equally it is said that in the case of No. III., "Rules for estimating the annual value of certain other Lands, Tenements, Hereditaments or Heritages which are not to be charged according to the preceding General Rule," where in reference to quarries of stone, slate, limestone and the like, five years are to be taken, there equally you will find a provision that where the longer period is not available a shorter period may be taken.

To my mind the argument suggested from those premises is against the respondents rather than in their favour. It appears to me that if the statute has been careful where a period of some years is to be taken as the basis on which the profits are to be computed, the statute has been alive to the fact that so long a basis might not exist, and has made provision accordingly. Is it to be said, then, that in the case of this particular subject-matter—namely, receipts from foreign possessions—that very important and obvious point has been overlooked, and that where three years are the basis on which the profits are to be computed there is no provision at all for a shorter period when no such basis is available? It appears to me that that is one of the reasons why there is introduced into r. 1 applicable to Case V. not merely some specific rule applicable to Case I. but you are instructed to compute as directed in Case I., that being a comprehensive term to embrace the Case and its satellite rules.

Then it is said that some light may be found from the forms which are given in the Act. Attention was called to the particular form which would be used in this particular case. It is to be found at p. 783 of Dowell's Income Tax Laws, 9th ed., and deals with an average of three preceding years and does not provide a form for a different kind of assessment. But those forms are introduced by s. 207, which says that the rules and directions and the forms are to be used so far as the same are respectively applicable. Whether we turn to the original of what Mr. Bremner not unfairly called the verbose antecedent of that section or whether we look at the section itself, its intention appears to be clear, if those forms and rules are applicable they are to be used, but if they are not they are not to be used, and the words, "so far as the same are respectively applicable," prevent one from turning to the forms or rules for an exposition of the sections of the Act; rather one has to determine the meaning of the sections of the Act and then where they fit, the rules and directions and forms are to be made use of, but not further.

Now I have dealt with those two points. It appears to me, therefore, that upon the plain construction of the Act there is a charge upon these profits from possessions out of the United Kingdom; that the difficulty only arises as to computation, and that inasmuch as there is a charge the computation is to be made upon the rule attached to Case V., modified, as it is, as directed in Case I.

In my view, therefore, the difficulties which prevailed on the mind of Rowlatt J. are not a valid excuse for the subject not paying his tax. As I am differing with Rowlatt J. I desire, of course, to pay full respect to his judgment, but it appears to me that there is a danger in looking at the difficulties which arise in working out a computation which may be solved, in many cases, on questions of fact, and failing to observe what is the overriding effect of the Act in charging these possessions to the tax and trying to find out a working system on which the computation is to be based.

It is, from my point of view, unnecessary to deal with the second point that was presented by the Attorney-General and argued very fully by Mr. Latter. I incline to agree with the view that Mr. Latter presented, that one ought to proceed with some caution before saying that a subsequent statute is a Parliamentary interpretation of a previous one; and the words that he quoted from Mr. Craies on Statute Law may perhaps be a correct statement of how the statutes ought to be used. On the other hand, one must not forget the broad principle stated by Lord Mansfield, that where there are different statutes in pari materia, though made at different times or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other.

In this case, even if I had to rely upon what is called the statutory interpretation of the Income Tax Act—namely, s. 26 of the Income Tax Act, 1924—it does not appear necessary to say that that is an interpretation of the previous statute. It is perhaps sufficient to say, as Younger L.J. did in his judgment in the *Cape Brandy* case (1), that he finds in a subsequent statute a statutory assertion and recognition of the view that he took of an earlier statute, or that you find a demonstration and that you can find an emphasis on a particular view. It may be that the second statute is not to be taken as strictly an interpretation Act. For that purpose it may be necessary to find such words as that in reference to the previous Act it shall be read and taken to mean and always to have meant, or that it shall be deemed to have meant and always to have meant—you must have some particular words of that sort. Nevertheless, casting aside the need for any interpretation, I do find that in the Act of 1924, s. 26 is in consonance with the conclusion which I have reached on the earlier statute, and in that sense I may say that I find a recognition and an assertion of the view which, on other grounds, I have already reached.

It appears to me, therefore, for these reasons, that the appeal must be allowed with costs, and the assessment which was affirmed by the Commissioners must be reimposed.

(1) [1921] 2 K. B. 403, 425.

SARGANT L.J.: I am of the same opinion. The question we have to decide raises the familiar difficulty of the extent of certain referential words. Here, as in many other cases, we have to decide what do those words comprehend, what is their content? The words in question are found in the rules applicable to Case V. in Sch. D to the Income Tax Act, 1918, and they provide that: "The tax in respect of income arising from stocks shares or rents in any place out of the United Kingdom"—the matter alleged to be taxable being of that nature in this case—"shall be computed on the full amount thereof on an average of the three preceding years as directed in Case I." When one turns to Case I., there is an initial rule applicable to Case I. only, and that provides that the tax is to extend to every trade and shall be computed "upon a fair and just average of three years ending" on a certain day—an alternative day. Then after a rule which applies only to Case II., we get a number of rules applicable both to Cases I. and II., and those rules, of course, are rules which are applicable to Case I., though they are also applicable to Case II. Rule 1 of those rules provides for cases in which the trade has not been established for the three years on which the average is ordinarily to be ascertained, and provides that in those cases the tax is to be assessed upon a varying principle.

Now the question is whether, in those words: "The tax . . . . shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I.," you are taking in, by those comprehensive words of reference, merely the directions in that initial rule applicable where the trade has lasted three years already, or whether you are also to take in the subsequent rules which apply for the comparatively infrequent case in which the trade has lasted for less than three years.

For the Crown, what is said is that the reference is to the directions in Case I., which in itself is quite broad enough to include that subsequent rule, and that the direction to compute upon the full amount thereof on an average of the three preceding years may well, when you are dealing with short referential words, deal with and comprehend not only the ordinary case in which three years have already elapsed, so that their average can be ascertained strictly in accordance with the rule, but comprehend also the less common case where three years have not elapsed and certain substituted rules have to be used for the purpose of the computation.

That argument is very much enforced by this: that what the rules are dealing with is the computation and not the imposition of the tax, and that words of imposition of the tax having been obviously sufficiently full to include cases not only in which three years have preceded the year of assessment, but in which one or two years only have preceded, or where the tax arises in the year of assessment itself, it would be a most extraordinary result if the Legislature, having imposed that tax so as to include those cases, were then to say impliedly that a particular method of computation is to be provided which results in no tax at all being imposed. Such a construction as that, in all those cases—cases which were directly within the view of the Legislature when they were dealing with Case I.—would seem to stultify altogether the taxing provisions which apply to Case V.

Those arguments on the part of the Crown appear to me to be exceedingly strong, and I think, further, that there is some difficulty in giving to the words themselves in Case V. the narrow meaning contended for on the part of the respondents. Because, when counsel were endeavouring to point out what was brought into Case V. by the referential words from that initial rule in Case I., they had first of all to say that you had to bring in the epithets "fair and just"; but that, whereas in Case V. the computation was to be on an average of the three preceding years, the effect of bringing in the rule applicable to Case I. was that that average was to be a fair and just average, because those were the words used in the rule applicable to Case I. I cannot really attach any importance to that. I think the average must necessarily be a fair and just average, and it is quite unnecessary to have any reference back to the previous rule for the purpose of

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importing those adjectives. If necessary, they could have been inserted perfectly well in the rule applicable to Case V. without unduly lengthening that rule.

But then, what was more important was this. Mr. Bremner said that the words, "on an average of the three preceding years, as directed in Case I.," define the three preceding years which had to be taken into account. In the case of a trade it would be the three preceding years down to the time of the taking of the ordinary account of the firm or the trade, and if there was no time of that sort, it would be to April 5 preceding the year of assessment. The first alternative as to the time of starting the trade hardly seems applicable to a case of this kind, and therefore one would think that the day of April 5 preceding the year of assessment would be the terminus ad quem. I do not think that those words "as directed in Case I." are so narrow as to be satisfied by such an interpretation. If the object of those words had been merely to say that the three preceding years were to be the same as those directed in Case I., I think the words would either have been "the three years preceding the date of the assessment," or, if the alternative was to be preserved, the language used would have been "the average of the three preceding years as defined in Case I." In my opinion, the words "as directed in Case I." are larger and more comprehensive words, and are not satisfied by bringing in only those two elements which were mentioned by Mr. Bremner. It seems to me they are better adapted for bringing in the subsequent provisions under which there is an alternative method of taxation when the three years' average is not applicable. I do not think that in ordinary language it would be at all inappropriate to say, when speaking of the rules applicable to Case I., that with regard to the profits of trade, and so on, the three years' average was the rule. So that in this Schedule, in bringing in the three years' average system which you find with regard to Case I., I see nothing at all definitely wrong in including in that phrase not merely the three years' average system in cases where that is applicable, but also the substituted provisions of very much the same nature which are to be found in cases where a three years' average was not possible.

In my judgment, therefore, though I must confess that the matter is to me an extremely difficult one, and that with regard to the question of the true interpretation of the Act my opinion has somewhat fluctuated during the course of the argument, still in the result, I differ from the result arrived at by the learned judge, and think that there is comprehended in these referential words in the rule applicable to Case V., not merely the first rule applicable to Case I., but the rule numbered 1 amongst those applicable to both Case I. and Case II.

On the other point, as regards the legislative interpretation of the statute of 1918, which is said to be found in s. 26 of the Act of 1924, I am inclined to take rather a stronger view in support of the appellant's contention than that taken by the Master of the Rolls. It seems to me that there is a well recognized principle that where the interpretation of a statute is obscure, ambiguous or readily capable of more than one interpretation, light may be cast on the true view to be taken of that statute by a subsequent statute either reciting the effect of the previous statute, or assuming that the construction is in one definite direction by virtue of the enactments made in the subsequent statute.

I follow, in that respect, the view stated by the late Master of the Rolls (Lord Sterndale) in the *Cape Brandy* case (1), and I think it is of importance to consider not merely the statutory interpretation, but the same doctrine as it arises with regard to the construction of other documents. Because, after all, Acts of Parliament are documents to be construed, in many respects, in very much the same way as other legal documents. To my mind *Darley* v. *Martin* (2) and the observations by Lord Brougham are of considerable assistance in this case. There, there had been a will, the interpretation of which was a matter of some difficulty. The will might have meant, taking it alone, either that the beneficiary took a life interest only in leaseholds with a gift over if she

(1) [1921] 2 K. B. 403.

(2) (1853) 13 C. B. 683.

died without leaving issue, or, on another interpretation (which I think would certainly have been that put on the will if the leaseholds had been freeholds), she would have taken an estate tail in freeholds and so took, in the leaseholds, an absolute interest. Jervis C.J., in delivering the judgment of the Court, says (1): " And, as to the effect of the codicil, it was argued, that an erroneous reference in a codicil to the dispositions of the will, cannot constitute a new bequest in opposition to the will, and *Skerratt* v. *Oakley* (2) was relied on. But it appears to us that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil; but, rather, that, the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil ; and that, accordingly "—and then he arrives at the conclusion which he does on that document.

Lord Brougham, in *Williamson* v. *Advocate-General* (3), says: " I come then, lastly, to consider the way in which the testator has dealt with the property, and, as it were, explained his own previous intentions in the recital to the second deed. The recital in that deed expressly uses the word 'required.' He says: 'Whereas, amongst others, my trustees are required to turn my means and effects thereby conveyed in trust into money.' It is a very good mode of construing an instrument, to take a man's own words when the meaning appears doubtful (which, however, I am in this case disposed to deny); I think it is a good mode of getting at his meaning, to see what he himself thought he had done."

It appears to me that that principle is equally applicable to successive Acts of Parliament, and that in cases where there is an ambiguity, a real difficulty of interpretation, it is a legitimate method of determining what Parliament has done, to see what Parliament says subsequently, either definitely or by implication, that it had previously done.

There was some argument addressed to us by Mr. Latter rather to show that there was no ambiguity in this case, but inasmuch as it has taken two days in this Court to arrive at the true determination of the meaning of this statute, and as we are ultimately coming to a conclusion on it different from that of Rowlatt J., it seems to me that we are well within the rule as to ambiguity, and that there is here such an ambiguity as that it is permissible to attempt to solve it by reference to a later Act of Parliament.

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(1) (1853) 13 C. B. 690.

(2) (1798) 7 T. R. 492.

(3) (1843) 10 Cl. & F. 1, 17.

Lawrence L.J. I agree that this appeal should be allowed, and will only add a very few remarks of my own.

The first question is whether the relevant referential words "as directed in Case I.," which occur in r. 1 of the rules applicable to Case V., are strong enough to import the provisions of r. 1 of the rules applicable to Cases I. and II., which rule deals with the case where a trade has been set up or commenced within the period of three years upon the average of which the profits are to be computed, or whether the referential words I have referred to operate to import only the provisions of the rule applicable to Case I., which deals only with the computation of profits or gains on a three years' average.

I frankly confess that I have not arrived at any definite conclusion as to the true answer to be given to that question, and had the result of this appeal depended upon my opinion upon the construction of those referential words, I should have desired further time to consider the case. But having listened attentively to the arguments of counsel at the Bar, and to the weighty judgments delivered by the Master of the Rolls and Sargant L.J., I have unhesitatingly come to the conclusion that there is an ambiguity in the language employed in the rule under consideration, and that the argument of the respondents, that the rule is plain and clearly only refers to the ascertainment or computation of the profits on an average of three years, cannot be sustained.

Now if, as I think, there is this ambiguity in r. 1, then I am further of opinion—and here I agree with Sargant L.J.—that s. 26 of the Finance Act, 1924, may, in the circumstances of this case, be looked at, in order to see what is the proper or true construction to be placed upon the words in question.

I found that opinion upon both the *Attorney-General* v. *Clarkson* (1) and the *Cape Brandy* case. (2) If it be permissible to look at s. 26 of the Act of 1924, I do not think there can be any reasonable doubt that the Legislature has itself fixed the true interpretation upon the rule in question. The whole of s. 26, which adds a new rule to the fasciculus of rules applicable to Case V., is based on the assumption that r. 1, which we are now construing, imports not only the rule applicable to Case I., but also the first rule applicable to Cases I. and II.; otherwise it is quite meaningless, and in that sense I think that the Legislature has itself put a construction upon a very doubtful expression, and that this Court is bound to give effect to that construction.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Jonathan Knowles, Bradford.*

R. M.

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April 4.

Local Government—Highway—Traffic—Order and Regulations limiting Omnibus Traffic—Restricted Street—Reference to Advisory Committee—Constitution—London Traffic Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 34), *s.* 1, *sub-ss.* 1, 4; *s.* 7, *sub-s.* 5; *Sch. II., Part I.* (*a*) *and* (*d*), *Part II.* (*i*).

On a reference to the advisory committee by the Minister of Transport of a question of declaring a street to be a restricted street under s. 7, sub-s. 1, of the London Traffic Act, 1924, the additional members do not sit.

CASE stated by Middlesex justices.

By s. 1 of the London Traffic Act, 1924 (14 & 15 Geo. 5, c. 34), an advisory committee was constituted consisting of (1.) ordinary members, who by sub-s. 2 were to be appointed by a Secretary of State, the London County Council and various councils and public bodies, and of (2.) additional members, who by sub-s. 3 were to consist of representatives of the interests of labour engaged in the transport industry and of representatives of those providing means of transport. By sub-s. 4 the ordinary members were to form part of the committee on all occasions, while the additional members were to do so " when [the advisory committee was] considering and reporting to and advising the Minister [of Transport] upon . . . . any matter or question referred to the committee under this Act in connection with the matters specified in Part I. of the Second Schedule to this Act." Part I. of the Second Schedule dealt with " Matters in respect of which the additional members are to form part of the advisory committee. (*a*) The co-ordination of all or any of the various forms of transport services, and co-operation between the persons operating the same or different forms of transport services with a view to the combined operation of all means of transport in the London traffic area in the best interests of the public. . . . . (*d*) The making of new orders, bye-laws and regulations . . . . relating to traffic on streets in the London traffic area."

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(1) [1900] 1 Q. B. 156.

(2) [1921] 2 K. B. 403.

By s. 7, sub-ss. 1 and 2, the Minister of Transport (herein called " the Minister ") could declare a street or part thereof a " restricted street " in which omnibus traffic might be restricted, and could make regulations. By sub-s. 5 the Minister, before doing either, " shall refer the matter to the advisory committee for their advice and report."

The respondent, Cornelius Beattie, was charged in two informations laid by the appellant, Harry May, and heard at the Ealing petty sessions on April 20 and September 21 and 28, 1926, for that he on March 30, 1926, not being a scheduled proprietor within the meaning of para. 3 and Sch. I. of the London Traffic (Restricted Streets) (Uxbridge Road) Provisional Regulations, 1926 (dated March 26), did ply for hire westward with his omnibus on two sections of the Uxbridge Road, contrary to para. 5 of the regulations hereinafter referred to and to s. 7 of the Act of 1924.

On February 14, 1925, the Minister, purporting to act under the Act of 1924, had submitted a reference to the advisory committee for their advice and report on the exercise of his powers under s. 7. (1) On February 9, 1926, the advisory committee made a report. It was made by the ordinary members only, and not by any of the additional members. On February 19, 1926, the Minister gave notice to the respondent that "after careful consideration" of the above report he had decided to make regulations under s. 7 limiting the number of omnibuses which might ply for hire on the above road, giving a list of proprietors, including the respondent, who might be affected. On March 22, 1926, he informed the respondent that no journeys on the said road had been allocated to him. The respondent was not, therefore, a scheduled proprietor. By the said Provisional Regulations, 1926, the Uxbridge Road was divided into sections A, B and C, and it was provided that after March 29, 1926, no omnibuses should ply thereon except those of scheduled proprietors. On March 30, 1926, the respondent, in spite of the above regulation, plied for hire with his omnibus on the said road.

The justices found that the said regulations were invalid and ultra vires on two grounds: (1.) that the Minister had not complied with the provisions of the London Traffic Act, 1924, in that the additional members of the advisory

(1) London Traffic Act, 1924 (14 & 15 Geo. 5, c. 34), s. 7, sub-s. 1: "Where as respects any street or part of a street within the area consisting of the City of London and the metropolitan police district, the Minister is of opinion that by reason (*a*) of the . . . . density of traffic [on a street or part of a street]; or (*b*) of the existence of alternative facilities for the conveyance of passengers along the street or part of the street or in proximity thereto, or of the omnibus accommodation on the street or part of the street being excessive; it is desirable that an order under this section shall be made, he may by order declare the street or part of the street to be a street in which the plying for hire by omnibuses ought to be prohibited or restricted either generally or during particular hours, and a street or part of a street with respect to which such an order is made is hereinafter referred to as a 'restricted street.'"

Sub-s. 2 enables the Minister to make regulations prohibiting or restricting omnibuses in such streets, and determining the omnibus proprietors who alone may ply for hire there.

Sub-s. 5: "Before making an order declaring any street or part of a street to be a restricted street, or making any regulations under this section, the Minister . . . . shall refer the matter to the advisory committee for their advice and report."

committee had not been consulted by him, and (2.) that the Minister in taking into consideration and acting upon the report of the said ordinary members of the advisory committee took into consideration matters outside the purview of the Act of 1924—namely, the financial position of the London United Tramways Company, Ld. (which owned and operated a tramway system on the said road), and the desirability of improving the financial position of the said company by protecting the same from the competition of omnibuses. They accordingly dismissed the informations, but stated this case.

Sir D. Hogg A.-G., *Roland Oliver K.C.*, *Giveen* and *Roome* for the appellants. Although not skilfully drafted the scheme of the Act is clear. There is to be an advisory committee set up in connection with the local administration of the traffic area, and to that committee, in certain cases, representatives of the proprietors and employees in the transport business, called additional members, are to be added. The Minister is given certain powers, and with regard to the exercise of some of them he is to consult the committee, and s. 7 forms a code regulating the procedure. Among the matters with regard to which he must consult the committee is the making of an order declaring a street to be a restricted street (sub-s. 5). It is said that the additional members should have sat on the committee under the provisions of Part I. of the Second Schedule, which enact that these members shall do so in the circumstances detailed in clauses (*a*) and (*d*). (1) But the Schedule is not concerned with references to them dealing with the ordinary administrative powers of the Minister but with references under s. 2 of the Act, dealing with matters of general policy, which the Minister may refer to them with a view to legislative action. And the matters dealt with in s. 7 are expressly excluded from the operation of Part II. of the Schedule, by para. (*i*), no doubt for the reason that the additional members would necessarily tend to be biased, inasmuch as they might be called upon to adjudicate upon the claims of their business competitors to run omnibuses in restricted streets.

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(1) Ante, p. 354.

With regard to the second ground there is no evidence that the Minister was influenced by the report of the committee, and he is not bound to act on their advice. But in any case he was bound to take this matter of the competition of omnibuses into consideration, for by s. 7, sub-s. 1 (*b*) (1), the existence of alternative facilities for the conveyance of passengers—in this case the tramways—is one of the matters he must consider, and in doing so he must, in the public interest, consider a circumstance, the competition of omnibuses, which may render the continuance of those facilities financially impossible.

Comyns Carr K.C. and *F. W. Wallace* for the respondent. It is unjust that the livelihood of the respondent, who only owns one omnibus, should be sacrificed to the interests of his rivals the large proprietors; therefore this Act should be strictly construed to prevent one man's business being taken away for the benefit of another. There is a presumption against the creation of a monopoly: see *Reed* v. *Ingham.* (2) The Act, as appears from the preamble, was passed "to make provision for the control and regulation of traffic"; therefore questions of the financial position of the proprietors of the means of transport are prima facie outside the Act. It was said that one would not expect the additional members to be on the committee when considering this question, because some of them would be financially interested in the question of the restriction of omnibus traffic in the streets under consideration; but among the ordinary members are representatives of public authorities who own tramways running in these streets. In this case employers and employees, both interested in the question, have been excluded from the committee, although it is submitted that the legislature intended that they should be present to present their views. The matters to be considered are plainly within para. (*a*) of Part I. of the Second Schedule to the Act of 1924, which enacts that the additional members are to form part of the committee where the matter under discussion is "The co-ordination of all or any of the various forms of transport services, and co-operation between the persons operating the same or different forms of transport services with a view to the combined operation of all means of transport in the London traffic area in the best interests of the public." Or they are within para (*d*): "The making of new orders, bye-laws and regulations . . . . relating to traffic on streets in the London traffic area." These are the very matters considered by the committee on a reference under s. 7. If the legislature intended that the additional members should not form part of the committee it would have included them in Part III. of the Second Schedule: "Matters in respect of which the additional members are not to form part of the advisory committee."

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(1) Ante, p. 355, note.

(2) (1854) 3 E. & B. 889, 899.

The Act ought not to be construed so as to allow a Government department to prevent competition with a view to putting money into the pockets of the trade rivals of the persons restrained from competing, even though the ultimate object is the benefit of the public.

AVORY J. This is a special case stated by justices of the peace for the county of Middlesex, raising several questions of law, only two of which have, up to the present, been decided by the justices. If we agree with the view taken by them it will not be necessary to send the case back, but if we dissent from them then it is obvious that it has to go back for their determination upon the other points.

The two grounds upon which the justices have decided, and which are very plainly stated in their judgment, are these: (1.) that the order and regulations made by the Minister under the London Traffic Act, 1924, were invalid, having been made upon a report of the advisory committee sitting without the additional members, as they are called. The Act of Parliament, by s. 7, sub-s. 5, provides: "Before making an order declaring any street or part of a street to be a restricted street, or making any regulations under this section, the Minister shall give such notice of his intention to make the order or regulations, as the case may be, as he may think best adapted for informing persons affected, and shall refer the matter to the advisory committee for their advice and report."

The order in this case was made upon June 3, 1925, and an attempt has been made by Mr. Comyns Carr to take a point which was not taken before the justices—namely, that the order was not made after the advice and report of the committee, and he based that contention on the fact that the only report of the committee which was produced before the justices was one dated in February of 1926. I am of opinion that that point is not open, first because it was not in fact taken before the justices, and, secondly, because on reading this report it is abundantly clear that prior to this date, February of 1926, the committee had made a previous recommendation to the Minister recommending the making of orders and regulations under s. 7 of the Act, and the report on its face states that these recommendations were adopted by the Minister, with the results which are set out in the report. Therefore the case is to be dealt with on the assumption that this order was made after the advisory committee had advised and reported upon the matter, and it is not disputed that the regulation which is in question was in fact made after the advice and report.

The question to be determined is whether the Act of Parliament required that the additional members, as they are called, should form part of the committee when they were considering and advising and reporting to the Minister in this particular case. Sect. 1, sub-s. 4, provides: "The ordinary members shall form part of the committee on all occasions, and the additional members shall form part of the committee when considering and reporting to and advising the Minister upon any matter referred to the committee under or by virtue of s. 10 of this Act, or any matter or question referred to the committee under this Act in connection with the matters specified in Part I. of the Second Schedule to this Act: Provided that the Minister may, if he thinks fit,

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direct that in any particular case the additional members shall form part of the committee when considering and reporting to and advising him upon any matter or question referred to the committee under this Act in connection with any of the matters mentioned in Part II. of the said Schedule." That refers us to the Second Schedule, Part I. and Part II., and here, before dealing with the difficulties which arise, it is fair to say that the learned Attorney-General admitted that this legislation was at least open to criticism, and Mr. Comyns Carr has agreed that it is full of tautology. I concur in both those criticisms upon it, and would add that not only does it contain a large amount of tautology, but that it contains a certain amount of contradiction also, which makes it very difficult to construe.

Was this a matter which comes within Part I. of the Second Schedule ? If it was, then the respondent here says that under s. 1, sub-s. 4, of the Act the additional members ought to have formed part of the committee. Now there is no doubt that the different clauses of Part I. of the Second Schedule are in such general terms that they might be said to include anything and everything which the Minister could do under this Act. Mr. Comyns Carr relies mainly upon clauses (*a*) and (*d*) of Part I. He says that the order and regulations in this case related to the "co-ordination of all or any of the various forms of transport services," or, he says, it clearly was a matter relating to "the making of new orders, bye-laws and regulations . . . . relating to traffic on streets," within the meaning of cl. (*d*). No doubt the words are wide enough to include this particular matter. But in my view, Part I. of the Second Schedule is not intended to refer or relate to the general administrative functions which the Minister is called upon to perform under the Act, but relates to matters with regard to which future general legislation is contemplated; and that view is confirmed, I think, by Part II. of the Schedule, which was drafted by those who must at the time have had in view what had been provided in clauses (*a*) and (*d*) of Part I., and they set out in Part II. certain matters in respect of which the additional members are, if the Minister so directs, to form part of the advisory committee. That obviously contemplates that they are not to form part of the advisory committee unless the Minister so directs; and in cl. (*i*) of Part II. we find, as one of the matters in respect of which the additional members are, if the Minister so directs, to form part of the advisory committee, this, namely: "The exercise of any of the powers of the Minister from whatsoever source derived in relation to traffic on streets in the London traffic area." That is a wide and comprehensive phrase which would seem to include all the powers which are given by this Act to the Minister, because almost all the powers which are given are in relation to traffic on streets in the London area. But the clause continues: "with the exception of any matters dealt with by him in virtue of s. 7 of this Act." I read that exception to mean this, that when the Minister is dealing with matters by virtue of s. 7 of the Act, not only do the additional members not form part of the advisory committee, but that is not a case in which the Minister can direct that they shall form part of the advisory committee. Turning to s. 7, in order to see whether there is any intelligible reason why the exception should be made, we find by sub-s. 1 that it is a section which deals expressly with the power of the Minister to declare a street to be a restricted street in which the plying for hire by omnibuses ought to be prohibited or restricted, and that that power is to be exercised if the Minister "is of opinion that by reason .... (*b*) of the existence of alternative facilities for the conveyance of passengers along the street or part of the street or in proximity thereto, or of the omnibus accommodation on the street or part of the street being excessive," it is desirable that an order be made. In those cases he is given power to prohibit or restrict omnibuses from plying for hire in a particular street or part of a street. Therefore, s. 7 being limited in that way in its operation, there does appear at all events an intelligible reason why it should be made an exception and taken out of Part II. of the Schedule which deals with cases where the Minister can call in the assistance of the additional members. If that view is right, then it is clear that no objection can be founded on the fact that in this case the additional members did not form part of the advisory committee.

The second ground is this. It is perhaps better to read the actual words of the judgment of the justices in this case. They say: "Even assuming the report of the committee to be in order, we are of opinion that the findings are largely based on the economic position of the tramway company. This is a question to which we find no reference in the Traffic Act, which appears to us to be an Act dealing only with the congestion and regulation of the traffic in the Metropolitan area." In my view, whatever conclusion may be drawn from the report of the committee, there is before us no evidence, nor was there before the justices, that the Minister in making the order and regulations was influenced by or that his decision was based upon what is called the economic position of the tramway company. Looking at the report of the committee, although no doubt it contains figures showing the amount of the capital which has been expended on the tramways, and showing the losses which have been made in recent years on the tramways owing to omnibus competition, yet in my view the overriding consideration which the committee had in mind was the necessity of maintaining the tramways in the interests of the public; and it is obvious, and it was obvious to them, that they cannot be maintained if they are continually being carried on at a heavy loss. Even if it be assumed that the Minister took into consideration the figures that appeared in the committee's report, I see nothing whatever to justify us in saying that he was influenced by any other consideration than the necessity of maintaining the tramways for the benefit of the public, and, in the words of s. 7, sub-s. 1 (*b*), of the existence of alternative facilities for the conveyance of passengers along the street, which in fact, of course, means, and can only mean in this case, the existence of the tramways. On those grounds, therefore, I think the second objection also fails, and that the appeal, therefore, ought to be allowed on these two points.

The other points of law which are set out in the special case depend, apparently, upon the finding of certain facts which have not yet been found, and for that reason they must all be remitted to the justices; and in accordance with the express wish of the Attorney-General, even if we cannot give an actual direction to the justices, we certainly express the hope that they will determine all these other objections before the case comes back to this Court again.

Swift J. I agree, and I have nothing to add.

Talbot J. I am of the same opinion. In this case the question arises primarily under s. 7, sub-s. 5, of the London Traffic Act, 1924, which provides that before making a certain order or certain regulations the Minister is, amongst other things, to refer the matter to the advisory committee for their advice and report; and the first point taken deals with the constitution of that committee, and it bears upon the construction of s. 1, sub-s. 4, of the same statute. That sub-section contemplates that there are certain members who are to be on the committee on all occasions, and certain additional members who are to form part of the committee when considering certain matters, and upon the question what those matters are the controversy here depends. They comprise, first of all, matters referred to the committee under s. 10 of the Act, which is not here material, and any matter or question referred to the committee under the Act in connection with the matters specified in Part I. of the Second Schedule to this Act.

Now, there are, as I read the Act, two functions of this committee. First of all, there are certain matters which have to be referred to it by the Minister before he can take certain steps under the statute, amongst other things, before he can make the order or the regulations which are in question here; but besides that, the committee has a duty, under s. 2, of considering and reporting to the Minister on any such matters and questions within the scope of the provisions of the Act as may be referred to it under the Act, or as the Minister may from time to time refer to it in connection with any of the matters mentioned in the Second Schedule to this Act.

The argument for the respondent in this case is based upon the provisions of the Second Schedule, and it is said that that Schedule uses words which are quite wide enough—and indeed they certainly are, considered by themselves—to include such an order or regulations as are in question here. But in my opinion, although the drafting of the Act is responsible for the confusion which has been introduced, that is not the true way to read s. 1, sub-s. 4, or the reference to the Second Schedule which is contained in it. In my opinion that Schedule relates not to matters which the Minister is bound to refer to the committee under the Act, but to matters which he may refer under s. 2 and on which, if he does refer, it is the duty of the committee to assist him. I think that follows when the Act is carefully looked at, and when Parts I. and II. and the Second Schedule are compared. This construction is greatly assisted by the heading of the Second Schedule: "Particular matters which may be referred to the advisory committee"—a heading which is singularly inappropriate if it comprises a matter which the Minister under the Act is bound to refer to the committee before he can take the action which is here in question. So read, I think the Act becomes fairly consistent, whatever one may think of the way in which it has been expressed. I agree, also, that when one looks at Part II. of the Schedule under the heading "Matters in respect of which the additional members are, if the Minister so directs, to form part of the advisory committee," and finds under that heading these words in cl. (*i*): "The exercise of any of the powers of the Minister from whatsoever source derived in relation to traffic on streets in the London traffic area, with the exception of any matters dealt with by him in virtue of section seven of this Act," it is really impossible to conceive that Parliament can have been excepting s. 7, which deals with the plying for hire by omnibuses within a certain area, and that alone, from the part of the Schedule which deals with the option of the Minister in certain cases to direct the special constitution of the advisory committee,

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and at the same time, with regard to the making of new orders, by-laws and regulations relating to traffic on streets in the London traffic area has obliged the Minister to order that the committee whom he consults is to include the additional members. That is a construction so insensible that I think it goes very near to demonstrating that the construction argued for on the part of the respondent is untenable.

With regard to the other point, I would only like to say this, that, assuming as I do for the purposes of this judgment, that the Minister in making the order and regulations did not shut his eyes to the financial effect of unrestricted omnibus competition upon statutory tramway undertakings, it appears to me impossible to contend that he was not entitled to consider that effect. His attention is specially directed by s. 7, sub-s. 1 (*b*), of the Act to, amongst other things, the existence of alternative facilities for the conveyance of passengers along the street as to which he is invited to make an order either prohibiting or restricting the plying for hire of omnibuses; and to say that Parliament, in giving such power, intended that he should not be entitled to consider how the existence of the tramway in that street might be affected if there was not some restriction of omnibus competition, seems to me an impossible view of the powers which Parliament by this statute intended to confer upon the Minister. Parliament naturally expected that he would consider all matters relevant to that question, and all the results of the existence of tramway facilities in the street, and it is not perhaps immaterial to observe that by sub-s. 6 of s. 7 Parliament retained to itself the power, if necessary, to disallow any regulation made under the Act by the Minister.

For these reasons I am of opinion that the justices came to an erroneous decision on the two points of law which they decided, and I agree that the matter must go down to them to deal with the rest of the case.

Appeal allowed.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *J. R. Cort Bathurst.*

W. L. L. B.

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May 3.

[IN THE COURT OF APPEAL.]

MERZ *v.* SOUTH WALES EQUITABLE MONEY SOCIETY, LIMITED.

[1926. M. 484.]

Money-lender—Security for Money—Registered Name—Promissory Note—"A. B. or secretary for time being"—"Otherwise than in registered name"—Money-lenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*c*).

Certain persons borrowed a sum of money from a company registered as money-lenders in accordance with the Money-lenders Act, 1900, under the name of the S. W. E. M. Society, Ld. As security for the money the borrowers gave and the company took a promissory note in the following form: "On demand we jointly and severally promise to pay to W. A. H. or other the secretary for the time being of the S. W. E. M. Society, Ld., 190*l.* value received":—

Held, that the company had taken a security for money "otherwise than in" their "registered name" within the meaning of s. 2, sub-s. 1 (*c*), of the Act, and that the note was illegal and void by virtue of that sub-section.

Appeal from the judgment of Wright J. in an action tried before the learned judge without a jury.

The defendants were formerly a loan society registered under the Loan Societies Act, 1840 (3 & 4 Vict. c. 110). They were incorporated as a limited company on September 27, 1917, and were registered as money-lenders under the Money-lenders Act, 1900.

On April 28, 1924, the plaintiffs and one Charles Barry borrowed from the defendants a sum of money, as security for which they gave, and in the course of their business as money-lenders the defendants took, a promissory note in the following form: "Cardiff, April 28, 1924. 190*l.* On demand we jointly and severally promise to pay William Arthur Horey or other the secretary for the time being of the South Wales Equitable Money Society, Ld., the sum of one hundred and ninety pounds value received. A. Pugsley, E. Merz, Kate Ann Pugsley, John Walters, Charles Barry.

"Witness to the signatures, L. W. Dean, 26 High Street, Cardiff."

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On June 24, 1926, the plaintiffs brought an action claiming a declaration that the promissory note was illegal and void under the Money-lenders Act, 1900. (1) The ground of their claim was that the note was taken otherwise than in the defendants' registered name. The defendants pleaded, as the fact was, that W. A. Horey was their secretary, and contended that the note was not taken otherwise than in their registered name.

Wright J. held that in the circumstances the security was not taken otherwise than in the registered name of the defendants, but that they had taken the security in their registered name within the meaning of the Money-lenders Act. He therefore refused the declaration.

The plaintiffs appealed.

R. O'Sullivan for the appellants. This case is concluded in favour of the appellants by *Stirling* v. *John* (2), where it was held in this Court that a security taken in the name of a nominee was not taken in the registered name of the money-lender. Wright J. followed *Peizer* v. *Lefkowitz* (3), but in that case the question was whether the money-lender was carrying on business in a name other than her registered name. Her registered name was the "Wentworth Loan and Discount Office." She had taken a promissory note which gave her registered name as the "Wentworth Loan and Discount Company." It was held that the inaccuracy was not such as to lead the Court to the conclusion that she was carrying on business in a name other than her registered name. The present case arises on a different provision of the Money-lenders Act, 1900. In order to comply with s. 2, sub-s. 1 (*c*), where the security is a promissory note the promisee must be the money-lender in his registered name, and he must be the person to sue upon it. The person to sue on this note is W. A. Horey. If he sued, the appellants could not avail themselves of the rights given to a borrower by s. 1 of the Money-lenders Act, because that section only applies when "proceedings are taken in any Court by a money-lender," and Horey is not the money-lender.

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(1) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1: "A money-lender as defined by this Act— . . . . (*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name. . . . ."

(2) [1923] 1 K. B. 557.

(3) [1912] 2 K. B. 235.

Vaughan Williams K.C. and *T. W. Langman* for the respondents. The note, being made payable to "W. A. Horey or other the secretary for the time being" of the respondents, is payable to the respondents. Formerly a promissory note made payable to an officer for the time being of a corporation was void for uncertainty: *Cowie* v. *Stirling* (1); and so was a bill of exchange: *Yates* v. *Nash.* (2) As long as the defendants were a loan society they were obliged by the Loan Societies Act, 1840, to take securities in the name of their treasurer: see ss. 16 and 19 and Sch. A. to the Act. The law as declared by *Yates* v. *Nash* (2) was altered by s. 7, sub-s. 2, of the Bills of Exchange Act, 1882, and now "a bill may . . . . be made payable to the holder of an office for the time being," and by s. 89, sub-s. 1, the same applies to a promissory note. Secondly, if a money-lender takes a bill or note payable to bearer he does not take a security otherwise than in his registered name: *Shaffer* v. *Sheffield* (3); and similarly if he takes one payable to "the secretary for the time being" of a company.

[SCRUTTON L.J. Who is the proper person to sue on this promissory note?]

The respondents might sue on it. This is not a case of an undisclosed principal attempting to sue on a negotiable instrument. The registered name of the respondents appears upon the face of the note. The object of the Legislature in providing that the security shall be taken in the registered name of the money-lender is to ensure that his identity shall be disclosed. It is enough to satisfy the Money-lenders Act if this is done: *Kirkwood* v. *Gadd* (4); *Peizer* v. *Lefkowitz.* (5)

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(1) (1856) 6 E. & B. 333.

(2) (1860) 29 L. J. (C. P.) 306.

(3) [1914] 2 K. B. 1.

(4) [1910] A. C. 422.

(5) [1912] 2 K. B. 235.

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Sect. 2 is a penal section, and in case of doubt will be construed so as to avoid rather than to effect the imposition of a penalty.

Counsel was not called upon in reply.

BANKES L.J. We have to decide what is the meaning of one sentence in the Money-lenders Act, 1900; we have not to regard the merits nor the possible harshness of a decision opposed to that of Wright J., but only the question whether the facts bring this case within the mischief of s. 2, sub-s. 1 (*c*). That section provides that "A money-lender shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name." The money-lender here is the respondent company. Apparently they were originally a loan society registered under the Loan Societies Act, 1840, and known by the same name, and promissory notes taken by that society were necessarily in the form in the Schedule to that Act. For convenience the Act provided that the treasurer for the time being should be the person to sue upon negotiable instruments, and that securities in the shape of promissory notes should be made payable to him. When the society was incorporated under the Companies Acts it is likely that the company continued to make use of the forms used by the society before incorporation. After incorporation the company was registered as a money-lender under the Money-lenders Act and became subject to the provisions of that Act. In my opinion the language of s. 2, sub-s. 1 (*c*), is reasonably plain. This is not a case like *Shaffer* v. *Sheffield* (1), where the security taken did not bear the name of the payee or promisee, but was a bill of exchange indorsed in blank and handed to the money-lender, whose name did not appear at all, and where Channell J. held that the case was not within s. 2, sub-s. 1 (*c*). It is not necessary for us to express

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any opinion on that case, for in the present case the name of the promisee is inserted. The form of the note is authorized by ss. 7 and 89 of the Bills of Exchange Act, 1882, the effect of which is that a bill or note may be made payable to the holder of an office for the time being. Here the promisee is the holder of an office for the time being—namely, the secretary for the time being of the company. Then how can it be said that the security was made or taken in the registered name of the company? It was not. It is in the name of an officer for the time being, and not only in the words "the secretary for the time being" but in the name of "William Arthur Horey or other the secretary for the time being. . . . ." No one could sue on that note but Horey or possibly some other person who was secretary for the time being. On the plain meaning of the statute the security was taken otherwise than in the registered name of the company. It is immaterial that the money-lender's name appears on the security, if it is not taken in the money-lender's name. It must be taken in his name and not in the name of any other person. If it is taken in another name it is idle to urge that the person in whose name it has been taken is a trustee or nominee for the money-lender or any one else; the security is not taken in the money-lender's registered name. Two cases were cited, neither of which in my opinion has any material bearing on this case. In *Stirling* v. *John* (1) cheques were drawn in the name of an employee, and the name of the money-lender himself did not appear at all, and there was no ground for the suggestion made in this case that because the money-lender's name does appear somewhere the Act had not been infringed. *Peizer* v. *Lefkowitz* (2) raised a question on s. 2, sub-s. 1 (*b*), a different clause in sub-s. 1 from the clause in question here—namely, whether the money-lender was carrying on business in her registered name. There the name was indicated. It was in fact the "Wentworth Loan and Discount Office." The money-lender had received promissory notes promising to pay S. Peizer of the "Wentworth Loan and Discount Company." It was held

(1) [1923] 1 K. B. 557.

(2) [1912] 2 K. B. 235.

that the use of the word "company" for "office" was not sufficient to mislead as to the identity of the money-lender, but Lush J. said (1) that if the point had been taken under sub-s. 1 (*c*) that there was a discrepancy between the registered name of the plaintiff and the name in which she had taken the notes, he was not prepared to say that the discrepancy might not have been calculated to deceive, although the difference between "company" and "office" was not sufficient to invalidate the notes under sub-s. 1 (*b*). In my opinion the appeal should be allowed and the declaration should be granted as prayed.

SCRUTTON L.J. I am of the same opinion. Five persons, three men and two women, borrowed 190*l.* from the South Wales Equitable Money Society, Ld., well knowing with whom they were dealing. They secured the loan by a promissory note, promising to pay William Arthur Horey or other the secretary for the time being of the South Wales Equitable Money Society, Ld., so that the security showed plainly on its face to every one into whose hands it came that the South Wales Equitable Money Society, Ld., was beneficially interested. But these zealous legalists desire to vindicate the law of the land; so they point out to the Court that the security is null and void by s. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900; and the Court has now to ascertain the true meaning of that sub-section uninfluenced by the fact that the appellants have no merits and the respondents may be quite innocently continuing to use what appears to have been a form sanctioned by statute at the time when they were a loan society, and merely overlooking the effect of the Money-lenders Act after they had become a money-lending company. The Act says that a money-lender "shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name." The question is whether it is necessary that the security should be literally in the registered name

(1) [1912] 2 K. B. 235.

of the money-lender or whether it is sufficient if it is known to the borrower and to everybody into whose hands the security comes that it is one in which the money-lender is beneficially interested. Now this being a penal statute we must be satisfied that the meaning attributed to it by the appellants is the only natural and ordinary meaning, for of two possible meanings we ought not to adopt one which would expose the respondents to a criminal charge if the other would leave them clear and free of any such charge. Notwithstanding that, I am unable to construe this statute otherwise than as making this form of promissory note illegal. The provision that the security shall be in the registered name of the money-lender imports that the money-lender is to be a party to the security. The respondent society is not a party to this promissory note, and could not sue upon it. The person to sue upon it is Horey or other the secretary for the time being of the society. But for the Loan Societies Act, 1840, they could not have sued on a note in this form before the Bills of Exchange Act, 1882. Now by the Act of 1882 a note may be made payable to the holder of an office for the time being, but it seems clear according to the law of negotiable instruments that the company of which the named payee is an officer is no party to the bill and cannot sue upon it. If so the only conclusion is that this security was taken otherwise than in the registered name of the money-lender. This follows from *Stirling* v. *John* (1), where the security was taken in the name of a nominee and nothing appeared on the face of the security to show that the nominee was an agent for the money-lender. The conclusion at which we have arrived is, I think, justified by the consideration that if Horey were to sue upon this note the borrower might have a difficulty in enforcing his rights under s. 1 of the Money-lenders Act, 1900, which can only be asserted " where proceedings are taken in any Court by a money-lender." It may be that proceedings taken upon this note by Horey would not be proceedings taken by a money-lender. We have been referred to the decision

(1) [1923] 1 K. B. 557.

in *Shaffer* v. *Sheffield* (1), where Channell J. held that a security indorsed payable to bearer was not taken by a money-lender "otherwise than in his registered name," on the ground that "otherwise" meant in some other name. I need not express my respect for the decisions of that learned judge; but if that point should again arise for decision I wish to hold myself free to consider whether it was rightly decided. I agree that the appeal must be allowed.

ATKIN L.J. I agree. In my opinion the Act provides that if a money-lender takes the security of a promissory note it must be in such a form that the only person who can sue upon it is the money-lender himself in his registered name. This promissory note obviously offends against the statute so construed. I also desire to reserve for consideration in this Court the question whether a promissory note payable to bearer, or indorsed in blank by the promisee, and then taken by the money-lender as security, would be within the Act. If it were necessary to consider the purpose of the Act it might be pointed out that one object of the Legislature is to see that the dealings of money-lenders should be open and above ground, and to restrict the degree of self-effacement with which some money-lenders used to conceal their identity. These objects would be defeated if a money-lender's security could be put in suit by a person whose name would not suggest that any money-lender had any part or share in the transaction. That person might appear in the Court lists as plaintiff; he might get judgment, and execution, and then appear as a petitioning creditor in bankruptcy, and in none of these proceedings would the registered name of the money-lender appear. Then there is the other consideration, that if the security is put in suit by a named person other than the money-lender there may be a question whether the proceedings are "proceedings taken . . . . by a money-lender" within s. 1 of the Money-lenders Act, 1900, and if it should be held that they were not, the borrower would be defeated of his rights under that section. But really it

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(1) [1914] 2 K. B. 1.

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is not necessary to discuss the intention of the Legislature further than as it is disclosed by the plain words of the Act. I agree with my brothers upon the meaning of those words, and therefore agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Field, Roscoe & Co., for A. F. Hill, Cardiff.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Stuart Hallinan, Cardiff.*

W. H. G.

EVANS *v.* PIAUNEAU.

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May 4.

Alien—Name—Change of—Addition of words " *& Co.*"*—Aliens Restriction (Amendment) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 92), *s.* 7, *sub-s.* 1.

An alien uses a name "other than that by which he was ordinarily known" on August 4, 1914, contrary to the Aliens Restriction (Amendment) Act, 1919, s. 7, sub-s. 1, if he adds to the name by which he was ordinarily known on that date the words " & Co."

CASE stated by a metropolitan police magistrate.

An information was preferred by the appellant, an inspector of Metropolitan Police, against the respondent, Pierre Piauneau, charging that he, being an alien, did on September 15, 1926, use a name other than that by which he was ordinarily known on August 4, 1914, contrary to s. 7, sub-s. 1, of the Aliens Restriction (Amendment) Act, 1919. (1)

On November 5, 1926, the information was heard by the magistrate at the Marlborough Street Police Court, London.

At the hearing the following facts were proved or admitted: The respondent was a French subject. He had resided in London since 1907. On January 28, 1926, the respondent commenced business at 56 Poland Street in the county of London, in the name of Pierre Piauneau & Co., as sole agents for Great Britain and Ireland of Felix Potin, of Paris, a firm of wholesale grocers. The true name of the respondent was Pierre Piauneau, and by that name he was ordinarily known on August 4, 1914. The notepaper used by the respondent in the course of the said business was headed as follows:—

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(1) The Aliens Restriction (Amendment) Act, 1919, provides: Sect. 7. "(1.) An alien shall not for any purpose assume or use or purport to assume or use or continue after the commencement of this Act the assumption or use of any name other than that by which he was ordinarily known on the fourth day of August, 1914."

"Felix Potin.
Société Anonyme.
Capital 100,000,000 de francs.
Sole Agents for Great Britain
and Ireland
Pierre Piauneau & Co.
(Pierre Piauneau).
General Offices &
Warehouse
56 Poland Street,
London, W. 1."

On the part of the appellant it was contended that these facts constituted a breach of s. 7 of the Aliens Restriction (Amendment) Act, 1919. (1)

On the part of the respondent it was contended that the words "& Co." were a mere addition which did not amount to a change of name; that s. 7, sub-s. 1, of the Act (1) applied only to an individual and not to a business; and that s. 7, sub-s. 2, had no application, because the respondent did not on August 4, 1914, carry on any business.

The magistrate held that the addition of the words "& Co." did not constitute a change of name within s. 7 of the Act, but amounted merely to a change of style, and that s. 7, sub-s. 2, had no application to a business not existing on August 4, 1914.

C. Humphreys for the appellant.

The respondent by describing himself as "Pierre Piauneau & Co." used a name other than the name Pierre Piauneau by which he was ordinarily known on August 4, 1914, and he therefore contravened s. 7 sub-s. 1, of the Aliens Restriction (Amendment) Act, 1919. The addition of the words "& Co." to the original name may be a trivial matter

(1) See note (1) ante, p. 374.

in this case, but it might be attended by serious consequences in some other case by enabling an alien to mask his identity for sinister purposes.

Claude Grundy for the respondent. The respondent, by describing himself as "Pierre Piauneau & Co.," did not use a name other than his original name of Pierre Piauneau. By so describing himself he continued to use the same name with an addition which has no legal significance. If the name used clearly indicates the true name of the alien no offence is committed against the Act of 1919. When the respondent assumed the style of Pierre Piauneau & Co. he had to, and in fact did, register in that style under the Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58). That style thereupon became his true legal name for business purposes, and he cannot be guilty of any offence in describing himself by it. It appears from the Rules of the Supreme Court, Order XLVIII.A, r. 11, that there is a difference between a name and a style. The respondent by adding the words " & Co." to his name may have changed his style but did not change his name.

[Avory J. referred to s. 7, sub-s. 2, of the Act of 1919.]

That sub-section deals with businesses carried on on August 4, 1914, and does not seem to apply to this case.

Lord Hewart C. J. This is a case stated by a metropolitan police magistrate, and the question which it raises may be very shortly expressed. An information was preferred against the respondent, Pierre Piauneau, charging that he being an alien used a name other than that by which he was ordinarily known on August 4, 1914, namely, Pierre Piauneau & Co., for the purpose of business, contrary to s. 7, sub-s. 1, of the Aliens Restriction (Amendment) Act, 1919. The magistrate dismissed the information, and the question is whether in doing so he came to a correct determination and decision in law. [His Lordship read the relevant provisions of s. 7 of the Act of 1919, stated the facts as set forth in the case, and continued as follows:] In order to contend that there has been no contravention by the respondent of the section in question, it is necessary to argue that the name "Pierre Piauneau & Co." is the same name as "Pierre Piauneau." That is an impossible proposition. It is equivalent to saying that $x+y$ is the same as x provided that y is small in quantity. Whatever may be the significance of the words "& Co.," it is manifest that the name "Pierre Piauneau & Co." is different from the name "Pierre Piauneau." There was no alternative open to the magistrate but to find that the offence had been committed. The amount of the penalty to be imposed for a contravention of the section is in the discretion of the magistrate.

Avory J. I am of the same opinion. Though sub-s. 2 of s. 7 does not apply to this case, as the respondent was not carrying on business in 1914, it seems to me that it throws some light on sub-s. 1, and tends to support the construction put upon that sub-section by the appellant. I come to the same conclusion as that at which my Lord has arrived—namely, that the respondent assumed and used a name other than that by which he was ordinarily known on August 4, 1914.

Shearman J. I am of the same opinion. It has been said that there is a difference between a name and a style, and that when the respondent described himself as "Pierre Piauneau & Co." he used a style other than that by which he was ordinarily known on August 4, 1914, but did not use a name other than that by which he was then known. In my opinion "Pierre Piauneau & Co." is a name, and when the respondent so described himself he used a name other than that by which he was ordinarily known at the material date. He has done something worse than if he had merely adopted a different style.

Appeal allowed.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondent: *Theodore Goddard & Co.*

J. R.

1927
May 10, 11,
12, 13, 20.

COLLINS *v.* HENRY WHITEWAY AND COMPANY, LIMITED.

Defamation—Libel—Privileged Occasion—Judicial Tribunal—Court of Referees—Administrative Duties—Qualified Privilege—Unemployment Insurance Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 30), *s.* 11.

The Court of Referees, which is constituted under the Unemployment Insurance Act, 1920, and the regulations thereunder for the purpose of deciding claims made upon the unemployment insurance funds, is a Court discharging administrative duties only, and communications made to that Court are not absolutely privileged, as would be the case if they were made to a judicial body in the discharge of its duties.

Action before Horridge J. and a special jury.

The plaintiff, Louisa Collins, who sued by William Collins, her next friend, claimed damages from the defendants, her former employers, for false imprisonment, malicious prosecution, and libel. These claims failed except in regard to one libel contained in a letter dated July 17, 1926. As to this, Horridge J. held that the occasion was privileged, but the jury found that it was written with malice, and assessed the damages at 150*l.* in favour of the plaintiff. It was contended on behalf of the defendants that the letter was written upon an occasion which was absolutely privileged. The letter in question was written on behalf of the defendants to the Divisional Controller, the Ministry of Labour, in respect of the plaintiff, who had applied to the officer appointed under the Unemployment Insurance Act, 1920, s. 11, for unemployment benefit. That officer, one of the officers referred to in s. 11 of the Act as "insurance officers," had reported the matter to a Court of Referees in accordance with the provisions of the Act. The letter was written after the Court of Referees had given its decision and before the insurance officer had promulgated it. It was proved in evidence that the Divisional Controller was the proper person to whom communications as to unemployment insurance should be addressed. The defendants contended that the letter formed part of the proceedings of a tribunal acting in a manner similar to a court of justice, and that such communication was entitled to absolute privilege.

After the jury had retired this point was argued.

Norman Birkett K.C. and *St. John Micklethwait K.C.* for the defendants. The letters written by the defendants are absolutely privileged, and we are entitled to judgment on the point of law. The case falls within the principles laid down in *Dawkins* v. *Lord Rokeby*. (1) The whole question was recently discussed in *Copartnership Farms* v. *Harvey-Smith* (2), in which statements made before a tribunal constituted under the Military Service Acts, 1916, were held to be absolutely privileged.

Neep (*Edinger* with him) for the plaintiff. The Court of Referees is an administrative and not a judicial body. The sole question before that Court was whether the plaintiff was entitled to unemployment pay, and the parties to the present action were not before the Court. Persons before that Court are not entitled to be represented by counsel or solicitors, and the Court of Referees, as constituted by the Unemployment Insurance Act, 1920, is in no way a judicial body, but exercises administrative duties only.

Cur. adv. vult.

May 20. HORRIDGE J. read the following judgment :—

In this action the plaintiff claims damages for (1.) false imprisonment, (2.) malicious prosecution, (3.) alleged libel contained in a document dated June 17, 1926, (4.) alleged libels contained in a letter of July 13, 1926, and (5.) alleged libels contained in a letter dated July 17, 1926.

As regards the claim for false imprisonment, there was no evidence in support of the claim, and Mr. Neep did not press it.

As regards the claim for malicious prosecution, the jury found that the defendants honestly believed the case which they laid before the magistrate, and there being no other evidence of malice on that issue I hold that the defendants were entitled to succeed.

(1) (1873) L. R. 8 Q. B. 255; (1875) L. R. 7 H. L. 744.

(2) [1918] 2 K. B. 405.

With regard to the claims for libel I hold that all the letters were written on privileged occasions.

As to the first claim for libel, I held there was no evidence of malice to go to the jury, and as to the letter of July 13 the jury found that it was written without malice.

The only remaining question therefore is as to the letter of July 17 in respect of which the jury found that it was written with malice and assessed the damages at 150*l.* But it was contended before me that that letter was written on an occasion which was absolutely privileged.

It was written in the following circumstances:—The plaintiff had applied to the insurance officer and the tribunal which was called in the Unemployment Insurance Act, 1920, a "Court of Referees," had investigated the matter. The letter in question had been written to the Divisional Controller, Ministry of Labour, who on the evidence was proved to be the person to whom communications with regard to unemployment insurance ought to be addressed. It was stated on behalf of the defendants that Mr. Henderson wrote the letter after he had heard that the Court of Referees had arrived at their decision, although it had not been promulgated.

By the Unemployment Insurance Act, 1920, s. 11, all claims for unemployment benefit and certain other matters are to be determined by one of the officers appointed under that Act, referred to as insurance officers. By sub-s. 2 of that section, where unemployment benefit is refused or stopped, or where the amount of the benefit allowed is not in accordance with the claim, the person claiming the benefit may require the insurance officer to report the matter to a Court of Referees constituted in accordance with the Act. That Court, after considering the circumstances, must make to the insurance officer such recommendations on the case as they think proper, and the insurance officer, unless he disagrees, must give effect to those recommendations.

By sub-s. 3, if the insurance officer disagrees with any recommendation made by a Court of Referees under this section he must, if so requested by the Court of Referees, refer the recommendation, with his reasons for disagreement, to the umpire appointed under the Act.

By sub-s. 5, where a recommendation has been made under s. 11, in the case of any person, by a Court of Referees, any association of employed persons of which that person is a member, and with the consent of the Court of Referees that person may require the insurance officer to refer the matter to the umpire, and by sub-s. 6 the decision of the umpire is to be final and conclusive.

By sub-s. 9 the Arbitration Act, 1889, is not to apply to proceedings under the Act except so far as it may be applied by regulation under the Act; but so far as I can ascertain, no regulation applying the Arbitration Act has been made.

By s. 22 penalties are imposed for making any false statements by any person for the purpose of obtaining benefit or payment.

Certain regulations called Courts of Referees Regulations and Courts of Referees Amending No. 2 Regulations, 1921, laying down certain matters with regard to the Courts of Referees, were made with regard to the constitution and procedure of the Courts of Referees.

It was contended before me that, as the letter in question was written after the Court of Referees had given a decision and before the insurance officer had promulgated it, it formed part of the proceedings before a tribunal acting in a manner similar to a court of justice and, therefore, any such communication was entitled to absolute privilege.

I was informed by counsel that the question whether statements made in connection with such inquiries were absolutely privileged had arisen at Leeds Assizes before Acton J., who had disallowed the claim for absolute privilege; but no report of the case was produced, and it appears that the judgment in that case was not a considered judgment.

In the case of *Copartnership Farms* v. *Harvey-Smith* (1) Sankey J. held that a local military tribunal was such a judicial body, and the decision was approved by Bankes L.J. in the case of *Gerhold* v. *Baker*. (2)

(1) [1918] 2 K. B. 405.

(2) (1918) 35 Times L. R. 102.

Sankey J. stated in his judgment that he conceived the principle to be that where a tribunal was a court of justice or a body acting in a manner similar to that in which a court of justice acted, any statement made by a member thereof was absolutely privileged and no action could be brought thereon.

In *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (1) Fry L.J. said: "It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word 'judicial' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege. I find no necessity or propriety in carrying the doctrine so far as this argument requires." Later on he says: "Furthermore there is no precedent for extending this immunity to all bodies which are bound to decide matters 'judicially,' in the sense in which this argument uses the term." In the same case there is the following passage in the judgment of Lopes L.J. (2): "The word 'judicial' has two meanings.

(1) [1892] 1 Q. B. 431, 447.

(2) [1892] 1 Q. B. 452.

It may refer to the discharge of duties exercisable by a judge or by justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration."

Upon the best consideration that I can give to the sections of the Unemployment Insurance Act, 1920, and the regulations thereunder, I think that the result is that by such Act and regulations the Court of Referees was created for the purpose of deciding claims made upon the insurance funds. It is not a body deciding between parties, nor does its decision affect criminally or otherwise the status of an individual. I therefore do not think that I ought to extend the protection given in *Dawkins* v. *Lord Rokeby* (1) to the present case. In my opinion it comes within the second definition in the passage of the judgment of Lopes L.J. in the *Royal Aquarium* case (2) which I have read.

The Court of Referees is merely discharging administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind.

I do not think that the communication in question is entitled to be regarded as absolutely privileged, and inasmuch as the jury have found malice, the plaintiff is entitled to succeed in respect of the 150*l*.

Judgment for plaintiff.

Solicitors for plaintiff: *Palmer & Robinson.*
Solicitors for defendants: *Field, Roscoe & Co.*

(1) L. R. 8 Q. B. 255; L. R. 7 H. L. 744. (2) [1892] 1 Q. B. 452.

F. P. F.

C. A.

1927

June 30 ;
July 1.

[IN THE COURT OF APPEAL.]

FAREY *v.* COOPER AND OTHERS.

[1927. F. 53.]

Goodwill—Assignor—Deed of Assignment for Benefit of Creditors—Covenant by Assignor to aid Realization of Property—Solicitation of Customers by Assignor on Behalf of other Trader.

A debtor who has assigned his business and goodwill to a trustee for the benefit of creditors is not precluded, in the absence of express stipulation to the contrary, from soliciting the customers of the old business, notwithstanding that the deed of assignment contains a covenant by him to aid to the utmost of his power the realization of the property assigned and the distribution of the proceeds thereof amongst the creditors. In such a case, therefore, the debtor cannot be restrained from canvassing the customers, nor can a third person be restrained from instigating the debtor to do so.

Principle of *Walker* v. *Mottram* (1881) 19 Ch. D. 355 applied.

Green & Sons (*Northampton*) v. *Morris* [1914] 1 Ch. 562 followed.

APPEAL from a decision of Finlay J. in an action tried with a jury.

The plaintiff was the trustee under a deed of assignment dated November 11, 1925, executed by C. T. Hill, G. A. Hill, and C. H. Hill (therein and hereinafter called "the debtors"), who had carried on business as bakers in Harrow under the name of Hill Brothers. By virtue of that deed the plaintiff became the owner by the assignment of the debtors' business and the goodwill thereof, and he was empowered to sell the same or to carry it on so far as might be necessary for the beneficial winding up of the estate. It was expressly agreed and declared " that in the administration of the joint and separate estates of the debtors under these presents the trustee shall follow and the creditors and debtors shall so far as circumstances admit have the benefit of and be bound by the rules rights and equities which govern or prevail in the administration in bankruptcy of the joint and separate estates of the joint debtors." The debtors covenanted (inter alia) to attend meetings of the creditors or the committee " and attend at such times on the trustee and generally do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof amongst the creditors as may be reasonably required by the trustee and will aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof amongst the creditors."

Whilst the plaintiff, as trustee, was carrying on the business, the debtors, it was alleged, solicited orders from the customers of the said business for and on behalf of themselves and/or the defendant Cooper, who carried on business as a baker in Harrow. The plaintiff thereupon claimed an injunction to restrain the debtors from soliciting the customers for orders and to restrain the defendant Cooper from instigating the debtors so to do. . . . . .

At the trial the jury found that G. A. Hill and C. T. Hill had solicited old and new customers of the business; that the defendant Cooper had instigated C. T. Hill to solicit the old and new customers of the business; and they awarded damages. Thereupon Finlay J. directed judgment to be entered for the plaintiff for the damages awarded; for an injunction restraining C. T. Hill and G. A. Hill from soliciting orders from customers of the business; and an injunction restraining the defendant Cooper, his servants or agents, from endeavouring to induce customers of Hill Brothers to deal with him.

The defendant Cooper appealed.

Sullivan K.C. and *Elkin* for the appellant. There was no evidence to support the findings of the jury, but even if those findings are accepted no wrong was committed by C. T. Hill in canvassing the customers of the business or by the appellant in instigating C. T. Hill to do so. While the general rule as laid down in *Trego* v. *Hunt* (1) is that the vendor of the goodwill of a business is not entitled to canvass his former customers, that rule has no application where the alienation is involuntary, as in the case of a bankruptcy; there the bankrupt is not precluded from soliciting his old customers: *Walker* v. *Mottram*. (2) Neither does the general rule apply

(1) [1896] A. C. 7.

(2) 19 Ch. D. 355.

to the case of the sale of a debtor's business by the trustee under a deed of assignment, as was held by Warrington J. in *Green & Sons* (*Northampton*) v. *Morris.* (1) That case was accepted as good law by Tomlin J. in *Boorne* v. *Wicker* (2), and is exactly in point in this case. The particular covenant in this deed of assignment whereby the debtors agreed to "aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof amongst the creditors" does not affect the application of the doctrine that in an involuntary alienation the assignor will not be precluded from soliciting his old customers, seeing that the covenant is a mere reproduction of the language of s. 19 of the Bankruptcy Act, 1869—now s. 22, sub-s. 3, of the Bankruptcy Act, 1914—which was before the Court of Appeal in *Walker* v. *Mottram.* (3)

[They were stopped.]

Pritt K.C. and *A. W. Roskill* (*Comyns Carr K.C.* with them) for the respondent. In this case there is a voluntary deed of assignment on terms which permit the respondent, the trustee, to carry on the debtors' business for an indefinite time if he thinks fit, and it is in view of that possible activity of the respondent that the debtors covenant to aid him to the utmost of their power in the realization of the property. In those circumstances Finlay J. was right in holding that there must be a covenant implied on the part of the debtors that they will not canvass either the old or the new customers, for to allow them to do so would enable them to destroy the very property they have assigned, and which the respondent is carrying on with a view to a sale to the best advantage. In *Walker* v. *Mottram* (3) there was no contractual relation between the parties, and that case is no authority against the present contention. *Walker* v. *Mottram* (3) was a case of bankruptcy, and it was considered contrary to the policy of the bankruptcy law to impose upon the bankrupt against his will an obligation which in the ordinary case of the sale of goodwill would be treated as an implied contract.

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(1) [1914] 1 Ch. 562.

(2) [1927] 1 Ch. 667.

(3) 19 Ch. D 355.

Here no question of the bankruptcy law is involved. Reliance is placed by the appellant on the decision of Warrington J. in *Green & Sons (Northampton)* v. *Morris* (1), but it is submitted that the view there expressed, that there is no distinction for this purpose between the position under a bankruptcy and that under a deed of assignment, is wrong, and should not be followed. That case is an authority only for this, that under a deed of assignment by debtors to a trustee the covenant which would be implied under *Trego* v. *Hunt* (2) does not enure for the benefit of a sub-purchaser; it is not an authority for the proposition that the trustee under a deed of assignment cannot enforce such a covenant. Here, as in *Trego* v. *Hunt* (2), there is a voluntary assignment, and under that decision, the respondent is entitled to prevent the debtors canvassing either on behalf of themselves or on behalf of the appellant.

BANKES L.J. This is an appeal in an action which was tried by Finlay J. with a jury. The action was brought by the trustee under a deed of assignment against the three assigning debtors and the present appellant, the case against him being that he being a baker in Harrow had instigated and allowed one of the debtors, C. T. Hill, to commit a wrong—it has been described as a breach of duty or a derogation from his grant or a breach of covenant—by soliciting the customers of the business formerly carried on by the three debtors as bakers in Harrow. Among other questions which the judge asked the jury was whether the appellant had instigated or conspired with the debtors or any of them to canvass the old and other customers of the trustee who was carrying on the business of Hill Brothers, and that question the jury answered in the affirmative, whereupon the judge entered judgment for the respondent and granted an injunction restraining the appellant his servants or agents from endeavouring to induce the customers of Hill Brothers to deal with the appellant. It is from that judgment that this appeal is brought.

(1) [1914] 1 Ch. 562.

(2) [1896] A. C. 7.

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Bankes L.J.

For the appellant it has been contended that there was no evidence to support the jury's finding. Upon that contention I say nothing, except that there is something to be said in support of it. It was also said that, assuming that there was some evidence to go to the jury, the verdict ought to be set aside on the ground of misdirection and non-direction and as being against the weight of evidence. Again, there is a good deal to be said in support of that argument, but, again, I express no opinion upon it, because I think that the point that has been urged, that the action will not lie against the present appellant, is conclusive, for the simple reason that the acts which he is said to have instigated or allowed were not wrongful acts, but were acts which C. T. Hill was in the circumstances perfectly justified in doing, and, if he was justified in doing them, it cannot be made matter of complaint against the appellant that he instigated or assisted him. I quite understand that the appellant denied that he did the things complained of, but for the present purpose that question remains undecided, because we propose to deal with the appeal on the point of law which I have stated.

Certain authorities will have to be referred to, but it is necessary to realize what the state of the law was at the time this deed of assignment was executed. It was dated November 11, 1925, and to a large extent it is in common form. Amongst other things it contains in the form of a covenant what are really extracts from the provisions of the Bankruptcy Act. By the covenant which is relied upon for the respondent and upon which the judge seems to have decided the case, the debtors covenant to "do all such acts and things in relation to the debtors' property and the distribution of the proceeds thereof amongst the creditors as may be reasonably required by the trustee and will aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof amongst the creditors." On the face of it that is an affirmative covenant; it defines what the debtors are to do by way of assisting the trustee in the realization of the property; but it is said that when rightly construed, there is implied a negative covenant not to do anything which will depreciate the value of the property, and, in particular, that the debtors will refrain from soliciting the customers of their former business, which they had assigned to the respondent, the trustee. The judge decided the case substantially on the ground that such a negative covenant must be implied. As to that I wish to say that I think that this deed is to be construed having regard to what the existing law in reference to this particular matter was at the time it was executed, for the purpose of seeing, first, whether the debtors did something they were not entitled to do, and, secondly, whether mere knowledge by the appellant that the debtors had assigned their property, including goodwill, to the trustee, without any knowledge that the deed contained this particular covenant, was sufficient to create a cause of action against the appellant.

I now desire to refer quite shortly to four cases in chronological order. The first is *Walker* v. *Mottram.* (1) That was a decision of the Court of Appeal, and it has stood as a binding authority since it was given in 1881. The question there raised was whether, in the case of a bankruptcy where the bankrupt's property and goodwill had passed to the trustee, the bankrupt was under an obligation as against the purchaser of the goodwill not to solicit the customers of his former business. It was held that he was not, on the ground, as I understand it, that the passing of the property by an act of bankruptcy from the bankrupt to the trustee created no obligation on the bankrupt, as between him and the trustee, not to derogate from the grant, or, rather, that there was no grant and no privity of contract between the bankrupt and the trustee from which any such obligation not to solicit customers could arise. I need only read these lines from the headnote of the report: "The rule of *Labouchere* v. *Dawson* (2), by which, in the case of a voluntary sale the vendor of the goodwill of a business is precluded from afterwards soliciting the former customers of that business, cannot be extended to the case of a compulsory alienation. The obligation enforced by the rule is purely personal, and not a mere incident to the transfer of property. Therefore the purchaser of the goodwill of a business from a trustee in bankruptcy or liquidation has no right to restrain the bankrupt or liquidating debtor from setting up bona fide a fresh business and soliciting the customers of his former business, and it is immaterial whether the bankrupt has or has not joined in the conveyance of the goodwill to the purchaser." I wish to call attention also to a point in *Walker* v. *Mottram* (1) which is important in reference to the present case. It has been pointed out that the words of the material covenant in this deed of assignment are a reproduction of provisions of the Bankruptcy Act, 1869, which was in force when *Walker* v. *Mottram* (1) was decided. Notwithstanding the language of the Bankruptcy Act, the Court decided that there was no obligation arising from the words there used, such as is now contended for from the contractual words in this deed of assignment. It is quite true that the point was not put in exactly the same way as it has been put to-day, but in my opinion it is impossible to come to any other conclusion than that the Court of Appeal in *Walker* v. *Mottram* (1) had in mind the provisions of the Bankruptcy Act, 1869, in arriving at their decision. It was there said in the argument for the plaintiff, the purchaser of the goodwill of the business from the trustee in bankruptcy, that the Act of 1869 expressly mentioned goodwill as included in the property of the bankrupt, that the bankrupt could not derogate from the grant in respect of goodwill any more than in respect of other property, and that the bankrupt was bound to assist his trustee in the realization of his property for the benefit of his creditors—the provision which is reproduced in the present deed of assignment. The Lords Justices referred in terms to the Bankruptcy Act, and in those circumstances it seems to me that that case must be treated as a decision that the Court of Appeal did not consider that soliciting the old customers

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(1) 19 Ch. D. 355.
(2) (1872) L. R. 13 Eq. 322.

(1) 19 Ch. D. 355.

was a breach of the statutory obligation that the bankrupt would aid the trustee in the realization of the property. That is important when I come to consider, as I shall a little later, the decision in *Green & Sons (Northampton)* v. *Morris* (1), and the construction that ought to be placed upon the covenant in the present deed of assignment.

The next case in chronological order to which I desire to call attention was decided in 1882, *Dawson* v. *Beeson* (2), which is interesting as illustrating how Sir George Jessel M.R. applied the doctrine of *Walker* v. *Mottram.* (3) In that case a partner had been expelled from the partnership, his interest being purchased by his former partners from the sheriff. The expelled partner having solicited the customers of the partnership, an application was made to restrain him from doing so. The Court declined to make the order asked for, and Sir George Jessel M.R. said (4): "The plaintiffs say that they had a right under the articles to expel their partner. Well, they did exercise that right and expelled the defendant, and then they bought the defendant's interest in the property from the sheriff. That is not equivalent to a voluntary alienation by a vendor, it is like the case of the alienation of a debtor's property by bankruptcy. The defendant loses the right to the business, but he does so involuntarily. He is turned out against his will, and is only entitled to receive the value of his share as if dead. He is not in the same position as a partner resigning voluntarily. Looking at *Walker* v. *Mottram* (3), I think that he ought not to be restrained from carrying on the business in his own name and soliciting customers."

Then came in 1895 the decision of the House of Lords in *Trego* v. *Hunt* (5), where the principle was definitely established that where a person voluntarily disposes of the goodwill of his business he cannot canvass the old customers. In that case Lord Herschell said (6): "It is not material to consider whether, on the sale of a goodwill, the obligation on the part

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(1) [1914] 1 Ch. 562.
(2) (1882) 22 Ch. D. 504.
(3) 19 Ch. D. 355.
(4) 22 Ch. D. 509.
(5) [1896] A. C. 7.
(6) Ibid. 21.

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of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity."

That was the position when *Green & Sons (Northampton)* v. *Morris* (1) was decided, and as I read that case it is an express decision that a deed of assignment for the benefit of creditors, although in one sense voluntary, must, for this purpose, be treated as involuntary and in the same position as the transfer which takes place by operation of law under the Bankruptcy Act from the bankrupt to the trustee. That, I think, is necessarily shown by the argument which was addressed to the judge and his decision. Mr. Simonds, who argued the case for the defendant, began by saying (2): "It is submitted that there is no obligation on the former owner of a business not to solicit where the goodwill is not sold by him but by his trustee under a deed of assignment for the benefit of creditors. . . . . There is no privity of contract between the assignor and the ultimate purchaser of the business." What is meant by saying there was no privity? It can only mean that there is no contractual obligation as between the assignor and the trustee, and, that being so, there is nothing which the trustee can pass on to the ultimate purchaser of the business. Then Mr. Clauson for the plaintiffs said (2): "The assignment in this case, although for the benefit of creditors, is a voluntary one and therefore differs from the case of a bankruptcy where the property vests by operation of law." Dealing with those propositions Warrington J. said (3): "The liquidating debtor is a person who is compelled by circumstances to take certain steps in order that his property may be distributed among his creditors in exactly the same way as a bankrupt who presents a petition

(1) [1914] 1 Ch. 562. (2) [1914] 1 Ch. 565.
(3) [1914] 1 Ch. 567.

under the present Bankruptcy Act. I can see no rational distinction between *Walker* v. *Mottram* (1) and the present case. In one sense what the debtor does is voluntary, in another sense it is not voluntary at all, as he may have taken the steps he did take in order to avoid other proceedings being taken by the creditors. A man by divesting himself of his property under such circumstances as those in this case does not thereby constitute the relation of vendor and purchaser between himself and the ultimate purchaser of the property." In using that language Warrington J. was referring to the point as to privity of contract. I agree that it is a contentious point whether or not a man who executes an assignment is for all purposes in the same position as a man who quite involuntarily comes within the provision of the Bankruptcy Act, but I am quite satisfied that what Warrington J. there decided was quite recently approved by Tomlin J. in *Boorne* v. *Wicker* (2), and I am certainly not prepared to dissent from it. I think the view expressed was right, and it is impossible to decide this case in the way Mr. Pritt asks us to do without overruling Warrington J.'s decision. I am not prepared to do that. I think when this deed was in fact executed the law was that a person under such a deed as this was under no obligation to refrain from soliciting customers of the old business, and from and after the decision of *Green & Sons (Northampton)* v. *Morris* (3), if it was desired to obtain greater protection than the law as it existed gave, some clear and precise words must be inserted in the covenant placing the assignor under the obligation not to compete. In the absence of such an express covenant in this case two consequences follow, first, it cannot be said that C. T. Hill was doing anything other than what he was entitled to do, in which case the appellant cannot possibly have committed any wrong entitling the trustee to proceed against him; and, secondly, the trustee would fail, even assuming that a different view were taken of *Green & Sons (Northampton)* v. *Morris* (3),

(1) 19 Ch. D. 355.

(2) [1927] 1 Ch. 667.

(3) [1914] 1 Ch. 562.

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for the reason that at the time this alleged wrong was committed the appellant was entitled to act on the belief that *Green's* case (1) was good law and all that he knew was that there had been an assignment for the benefit of creditors, and he had no reason to know that it contained anything which took the case out of that decision. Therefore it seems to me that whether the covenant is treated as one which does not contain the implied negative obligation now contended for, or whether it is treated as containing such an obligation, the appellant is entitled in the one case to say that he has done no wrong, and in the other that it has not been shown that he knew of the obligation and infringed it, and that in the absence of that knowledge he could not be made liable. In my opinion the appeal must be allowed.

ATKIN L.J. I agree. This is a case of a deed of assignment by certain debtors who were carrying on a baker's business in Harrow, and the respondent is the trustee under the deed. The case made against the appellant, who is another baker carrying on an old established business in Harrow, is for procuring the breach of a covenant, express or implied, not to solicit the old customers of the business, or the new customers acquired by the trustee in the course of his conduct of the business under the deed of assignment. In order to establish a case of procuring a breach of covenant it is, of course, necessary to establish that there was such a covenant, and that the person procured to commit the breach was, in fact, under an obligation to refrain from the act. That has given rise to a very interesting question of law. As far as appears from the summing up the judge adopted a simple method of solving the question by leaving it to the jury to say whether or not there was such an obligation, and we must assume that the jury found that such an obligation existed. But we are told that, although he in terms left it to the jury, he had, in fact, ruled upon it before and indicated his view that there was an obligation subsisting. We have now to consider whether that proposition is right.

(1) [1914] 1 Ch. 562.

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It is said for the respondent that the debtors had assigned all their property and the goodwill of the business to the trustee, and by that assignment, or by express or implied covenant, they were under an obligation to abstain from soliciting the customers of the business, whether they were customers at the date of the assignment, or whether they had since been acquired by the trustee. In considering that, a simple way of approaching the case is to inquire, in the first place, what would have been the position if, instead of there being a deed of assignment, there had been a bankruptcy petition upon which the debtors had been adjudicated, and the respondent was trustee in bankruptcy, in whom the property of the debtors, including goodwill, was vested. In such a case it appears to me that the bankrupt is under no obligation to the trustee to abstain from soliciting the old customers of the business, and a fortiori, from soliciting customers acquired after his connection with the business had come to an end. That was the decision in *Walker* v. *Mottram.* (1) It is unnecessary, I think, to consider the grounds for it. No doubt in a case of bankruptcy it is founded upon the fact that there is no voluntary disposition by the debtor of his business, and therefore, no opportunity of implying a contract between the bankrupt and the trustee. I think what also influenced the Court to come to their conclusion is the view that, whereas in the case of a voluntary disposition a man, by soliciting his old customers, is doing something that might be said to be a breach of faith in diminishing that which he has sold—a derogation from his grant, it has been called—in a case of bankruptcy, not only does that consideration not apply, but a contrary view is indicated—namely, that the policy of the Bankruptcy Act is to enable the bankrupt to resume his position in the world as far as possible, and carry on his business—there is nothing to restrain him from carrying on his business—and inasmuch as he, being then a bankrupt, would have very few persons to deal with except those he had known beforehand, he should not be precluded from asking the assistance of his former

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(1) 19 Ch. D. 355.

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customers in order to enable him to rehabilitate himself in the commercial world. I think that was taken into consideration. Therefore, if it were a bankruptcy pure and simple, it seems to me plain that the debtors would be under no obligation to abstain from soliciting their former customers. But it is said that this is the case of a deed of assignment, and, therefore, the position is the same as an ordinary case of a sale to a trustee. One answer that has to be made to that, and indeed it is admitted to be a forcible answer by Mr. Pritt, is that that is not enough to justify the verdict which has been obtained, and the injunction which has been granted, because it is plain that the implied obligation in a purchase and sale of a goodwill with nothing more, is merely an obligation—as was laid down by the House of Lords in *Trego* v. *Hunt* (1)—to abstain from soliciting those who were customers of the business at the time of the sale, and does not apply to new customers obtained after the sale. Inasmuch as the damages here have been assessed on the footing of soliciting new customers, and inasmuch as the injunction is also addressed to restrain the defendant from procuring the solicitation of the new customers, the verdict would have to be set aside and the injunction discharged and a new trial would have to be ordered on that ground alone. Therefore, Mr. Pritt puts the case on a wider footing, and contends that in this case there was an express covenant which the respondent was entitled to enforce as against the debtors, and a breach of which had been procured by the appellant. The covenant is that the debtors would aid to the utmost of their power the realization of the debtors' property and the distribution of the proceeds thereof amongst the creditors, and it is said that that obligation imported a negative obligation not to solicit the customers of the business either new or old. That covenant must be considered as a whole and in conjunction with the other covenants and stipulations, and it is to my mind very relevant to bear in mind, as was pointed out to us, that that covenant is nothing but a repetition in the deed of the words of the Bankruptcy Acts—the present

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(1) [1896] A. C. 7.

Act and the former Bankruptcy Act—governing the duties of a bankrupt towards a trustee in bankruptcy. The words are to be found in s. 22, sub-s. 3, of the Bankruptcy Act, 1914, and they appeared in s. 19 of the Bankruptcy Act, 1869. Not only do these words appear, but the previous covenant in the same deed that the debtors will give such further inventory of the property and particulars of their creditors and debtors, and attend examinations, and attend meetings, and do all such acts as may be reasonably required by the trustee, are all words taken almost verbatim from the provisions of s. 22, sub-s. 2, of the Act of 1914, and are in themselves merely a restatement by way of contract of the obligation imposed by the statute. To my mind it follows that in considering such a contract in a matter in pari materia with the Bankruptcy Act it would be right to give to the words in the contract the same construction as had been given to the words in the statute, and I think it is made more obvious that that is the right construction when it is remembered that by one of the clauses of the deed it is expressly agreed and declared that "in the administration of the joint and separate estates of the debtors under these presents the trustee shall follow and the creditors and debtors shall so far as circumstances admit have the benefit of and be bound by the rules, rights and equities which govern or prevail in the administration in bankruptcy of the joint and separate estates of the joint debtors." Therefore, I think that we ought to put upon those words in a contract the construction that is put upon the same words in the Bankruptcy Act. It is quite plain that those words in the Bankruptcy Act would not be construed to impose an obligation upon a bankrupt to refrain from soliciting the customers of the business whether new or old, because if they ought to be so construed in bankruptcy *Walker* v. *Mottram* (1) could not have been decided as it was. I think, therefore, these words do not bear the meaning that is sought to be put upon them by Mr. Pritt. I should also come to the conclusion that inasmuch as the duties of the debtors to the trustee in respect of the

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(1) 19 Ch. D. 355.

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business are carefully defined in this express covenant, that covenant would probably exclude the existence of an implied covenant different from the express covenant, though dealing with the same subject-matter. Therefore, if it rested on contract alone, I think the position would be as I have stated, apart from other decisions; but it was decided by Warrington J. in *Green & Sons* (*Northampton*) v. *Morris* (1) that the same position exists in the case of an assignment for the benefit of creditors as exists in bankruptcy, and that the principle of *Walker* v. *Mottram* (2) ought to be applied to a debtor on a sale under a deed of assignment as is applied in the case of a sale by a trustee in bankruptcy. The reason adduced by Warrington J. was that for practical purposes the position must be treated as the same, and the assignment must be treated as being more or less involuntary. I think it sufficient to say that I am not prepared to dissent from the statement of the law which has existed for a considerable time, and has been dealt with over and over again under deeds of assignment on the footing that such is the law. Therefore, I think that we are left in this position, that the principles of bankruptcy apply in this case.

Mr. Pritt sought to distinguish both *Walker* v. *Mottram* (2) and *Green & Sons* (*Northampton*) v. *Morris* (1) on the ground that in both those cases what was in question was a sale by the trustee, and that the purchaser from the trustee had not the same rights against the debtor as the trustee himself would have. To my mind that is quite an impossible contention. I apprehend that the decision of *Walker* v. *Mottram* (2) is based upon the consideration that a trustee in bankruptcy himself has not a right as against a debtor to restrain the debtor from soliciting the old customers of the business. If he had such a right it seems to me that he would be capable of passing it on. It does not matter whether his right would be derived from contract, or from an obligation under the statute, or would be derived from the vesting of the property and the obligation imposed by s. 22. It is obvious to my mind that if the trustee had

(1) [1914] 1 Ch. 562.

(2) 19 Ch. D. 355.

such a right he would have been able to use it for the benefit of the estate, and to pass it on to a purchaser, thereby getting the greatest value for the estate that he could. I think that the reasoning in *Walker* v. *Mottram* (1) depends upon this, that there was no such obligation as between the debtor and the trustee, and therefore it could not be passed on to a purchaser from the trustee. I think that is the view taken by Warrington J. in *Green's* case. (2)

The result seems to me to be that inasmuch as the debtors were under no obligation to the respondent to refrain from doing the acts complained of, the appellant could not possibly be made liable either for damages, or to have an injunction made against him restraining him from procuring acts which themselves were lawful in the debtors. It follows that the verdict and judgment given against the appellant must be set aside, and judgment entered for him. That in itself would carry costs, and this appeal must be allowed with costs. It also follows, I think, from what I have said, that the verdict and judgment against the appellant's co-defendants were irregularly obtained, but as they are not appellants in this case nothing more need be said about them.

LAWRENCE L.J. I agree. The case against the appellant was that he instigated C. T. Hill, one of the debtors, to commit a breach of contract. The breach alleged to have been instigated is of an implied covenant on the part of the Hills with the respondent not to canvass either the old or the new customers of the firm of Hill Brothers. The first and vital question therefore is whether there was any such implied covenant. As regards the new customers, that is to say, those who became customers after the execution of the deed of assignment, the rule in *Trego* v. *Hunt* (3) does not apply, but it is said that a covenant not to canvass customers ought to be implied by reason of the obligation undertaken by the debtors in the deed of assignment to aid the trustee in the realization of the property. As regards the old customers

(1) 19 Ch. D. 355.
(2) [1914] 1 Ch. 562.
(3) [1896] A. C. 7.

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the additional point was taken that the rule in *Trego* v. *Hunt* (1) applies, and that the decision of Warrington J. in *Green & Sons (Northampton)* v. *Morris* (2), which determined that that rule is not to be imported into an assignment for the benefit of creditors, ought not to be followed. I agree with Bankes and Atkin L.JJ. that *Green's* case (2), which has stood for so long undisturbed and unquestioned, ought not to be overruled. But Mr. Pritt has further argued that, even if that case stands, it is distinguishable on two grounds, the first being that it was a case not between the trustee and the debtor but between the purchaser from the trustee and the debtor. In my opinion that is not a sound distinction. The foundation of the decision in *Walker* v. *Mottram* (3) and in *Green*'s case (2) is that there is no implied contract by the debtor with the trustee the benefit of which the trustee can pass on to a purchaser. According to *Walker* v. *Mottram* (3) in the case of bankruptcy and according to *Green's* case (2) in the case of assignment for the benefit of creditors, the bankrupt and the assigning debtor can solicit the old as well as the new customers of his former business. The second ground upon which Mr. Pritt sought to distinguish *Green's* case (2) was that there was there no such covenant as there is here, that the debtor would aid the trustee in the realization of the property. That brings me to the main question whether a covenant not to canvass the old or new customers ought to be implied on the part of the debtors in the present case from the fact that the deed contains a covenant by them to aid the trustee in the realization of the property. That latter covenant, as has been pointed out, is a mere repetition of the statutory obligation imposed by the Bankruptcy Acts upon bankrupts, and the same construction must be applied to it as was applied in *Walker* v. *Mottram* (3) to its statutory equivalent—namely, s. 19 of the Bankruptcy Act, 1869. But quite apart from that, what is the property which the debtors have covenanted to aid the trustee in realizing?

(1) [1896] A. C. 7.

(2) [1914] 1 Ch. 562.

(3) 19 Ch. D. 355.

The property assigned includes the goodwill of the business, but in view of the nature of the assignment that goodwill consists only of the probability of the old customers resorting to the old place of business and does not connote an obligation not to solicit the old or the new customers. A covenant to aid in the realization of the property assigned cannot in my opinion have the effect of altering the character of that property or of enhancing its intrinsic value. In my opinion, the Court in the circumstances ought not to imply a covenant not to do something which the law allows the debtors to do—namely, to solicit the old and new customers. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *Geo. H. Exeter.*
Solicitors for respondent: *Biddle, Thorne, Welsford & Gait.*

J. S. H.

THE KING v. MINISTER OF TRANSPORT.

Ex parte H. C. MOTOR WORKS, LIMITED.

1927
April 5.

Local Government—Hackney Carriage—Motor Omnibus—Licence—Condition—Undertaking to charge fixed minimum Fare—Jurisdiction of Minister of Transport—Order—Certiorari—Mandamus—Roads Act, 1920 (10 & 11 *Geo.* 5, *c.* 72), *s.* 14, *sub-s.* 3.

A company ran omnibuses along a route from the centre of a city to a place outside of it. The corporation of the city ran tramways along a portion of the route within the city. The corporation refused to license the omnibuses unless the company would give an undertaking to charge upon the common portion of the routes a fare higher than the tramway fare. The company appealed under the Roads Act, 1920, s. 14, sub-s. 3, to the Minister of Transport, who made an order in effect affirming the decision of the corporation on the same grounds—namely, that it was in the public interest that the undertaking should be given, inasmuch as it would prevent the long distance passengers by the omnibuses from being excluded therefrom by the short distance passengers who were sufficiently provided for by the corporation tramway, and would also prevent the revenue of that tramway from being unnecessarily diminished. On rules nisi for a certiorari to bring up the order of the Minister, and for a mandamus to him to determine the appeal in accordance with the law, on the ground that he had considered extraneous matter—namely, the fares to be charged by the company:—

Held, that the Minister, having dealt with the fares for the purpose of attaining an object of public interest appropriate to his jurisdiction, had not considered extraneous matter, and that the rules should be discharged.

Rex v. *Farnborough Urban Council. Ex parte Aldershot District Traction Co.* [1920] 1 K. B. 234 explained and distinguished.

ORDERS NISI for a certiorari and a mandamus respectively.

The H. C. Motor Works, Ld. (hereinafter called "the company"), were the proprietors of motor omnibuses with which they ran a service between the centre of Hull and Hessle along a route of 4¼ miles, of which about 3 miles were within Hull. The authorities for licensing vehicles to ply for hire were for Hull the corporation of the city, and for the remainder of the said route the urban district council of Hessle. The corporation owned tramways, and ran them along about 2¾ miles of that part of the said route which was within Hull.

In April, 1925, the corporation sent to the company a form of requisition for motor omnibus licences to be renewed by the corporation in respect of the said route, which contained an undertaking that a minimum fare would be charged. The company objected to the undertaking, and signed and returned the form with a qualifying clause. The corporation finally assented to that clause and renewed the licences upon the requisition as altered. Certain interviews and correspondence then took place in regard to the matter. In August, 1925, the corporation again sent to the company a form of requisition for the said motor licences, which contained an undertaking that the minimum fare should not be less than one penny in excess of the tramway fare for the said route. The company signed and returned these forms also with a qualifying clause. The company did not then comply with the said undertaking or condition, but charged fares which were below the said minimum fares. By a letter dated July 2, 1926, the corporation informed the company, in effect, that unless they would carry out an undertaking to charge a minimum fare of not less than one penny in excess of the tramway fare for the said route, without the addition of any qualifying clause, then the corporation might have to refuse to renew the licences for the company's omnibuses. On July 21, 1926, the representatives of the company attended a meeting of the licences sub-committee of the corporation, at which they refused on behalf of the company to give the desired undertaking, and on July 26, 1926, the company caused to be sent to the corporation a letter enclosing forms of requisition for licences for their omnibuses on the said route from which a condition or undertaking as to minimum fares had been deleted. In reply to that letter the company's representatives received a letter dated July 30, 1926, from the town clerk, in which it was stated that the said sub-committee had decided not to grant licences for the omnibuses specified in the said requisitions, because the company had refused to comply with the said undertaking or condition as to minimum fares, and that their decision had been confirmed by the watch and licensing committee and would come before the council of the corporation. The council in due course confirmed the committee's decision.

By a letter dated August 6, 1926, sent on their behalf, the company appealed to the Minister of Transport against the decision of the corporation. On October 5, 1926, an inquiry was held in Hull before the representative of the Minister. As to the decision above referred to it was submitted on behalf of the company that the corporation were not in law entitled to consider the question of fares in deciding on applications for licences for omnibuses or to impose as a condition of such licences any undertaking or stipulation as to fares; and, alternatively, that if the corporation were so entitled, then on the facts of the case no such undertaking or stipulation ought to be imposed. It was submitted on behalf of the corporation that they were entitled to impose and enforce an undertaking to charge the said minimum fare, and justified in so doing in order to protect the tramway undertaking of the corporation, and to ensure, so far as possible, that passengers on the omnibuses should be passengers between Hull and Hessle and not passengers from one point to another in Hull. By a letter dated November 19, 1926, from Mr. Henry Howard Piggott, the assistant secretary of the Ministry of Transport, to the representatives of the company it was stated as follows: "Roads Act, 1920, s. 14 (3.). I am directed by the Minister of Transport to refer to your letter of the 6th August . . . . appealing . . . . against . . . . the grant of licences by the Hull corporation subject to conditions. I am to inform you that after due investigation of the facts and after careful consideration of the representations made at the inquiry which was held at Hull on the 5th October, 1926, the Minister has decided to make no order. . . . ."

On December 17, 1926, the company obtained an order nisi calling upon the Minister of Transport to show cause why a writ of certiorari should not issue to remove his decision contained in his letter of November 19, 1926, into the High Court for the purpose of being quashed, and an order nisi calling upon him to show cause why a writ of mandamus should not issue to him, commanding him to hear and determine the company's appeal against the refusal of the corporation to grant to the company licences to ply for hire with omnibuses, each of these orders nisi being obtained upon the grounds that the Minister in deciding or purporting to decide the said appeal did not properly exercise or exceeded his jurisdiction or declined jurisdiction, in that he considered and acted upon extraneous matter—namely, the fares charged and intended to be charged by the company upon their said omnibuses, and that he did not hear and determine the appeal according to law.

In an affidavit made by him, the assistant secretary of the Ministry of Transport stated that "In the circumstances of this case the Minister considered it essential in the public interest that some arrangement should be made to discourage the use of the prosecutors' vehicles for the carriage of short-distance passengers on that portion of the route which is served by the tramway system, and in the absence of an arrangement which would have that effect, he would not be prepared to order the issue of licences. The Minister is not aware of any arrangement other than an undertaking on the lines of that required by the licensing authority in this case, which would legally secure this effect."

Sir D. M. Hogg A.-G. and *W. Bowstead* for the Minister of Transport. These rules nisi should be discharged. The applicants are not entitled to either a certiorari to remove the order of the Minister into this Court or a mandamus to the Minister to hear and determine their appeal against the decision of the corporation on the ground that the Minister did not properly exercise or exceeded his jurisdiction or declined jurisdiction. The Minister heard and determined the appeal by the applicants from the decision of the corporation, and in making the order in question he did not improperly exercise or exceed his powers. The order of the Minister was made under the Roads Act, 1920, s. 14, sub-s. 3. That sub-section provides that where upon application for an omnibus licence, the licensing authority either refuses to grant a licence or grants a licence subject to conditions the applicant shall have a right of appeal to the Minister from the decision of the licensing authority, and the Minister shall have power to make such order thereon as he thinks fit, and such order shall be binding upon the licensing authority, and that the order of the Minister shall be final and not subject to appeal to any Court. Under that sub-section the licensing authority has power to grant a licence to ply for hire with an omnibus subject to conditions which are within its ambit and in imposing which it has not taken into account extraneous matter, and if the conditions be not observed it is open to the licensing authority to refuse to renew the licence: *Rex* v. *Bradford Corporation. Ex parte Minister of Transport.* (1) In the present case the decision of the corporation was that an omnibus licence should not be granted to the applicants, except subject to a condition that the minimum fare should not be less than one penny in excess of the tramway fare for the same route, that condition being imposed on grounds of public interest; and the order of the Minister in effect affirmed that decision on the same grounds. If the decision of the corporation was in excess of their jurisdiction by reason of its refusing the licence except subject to illegal conditions, the applicants should have applied for a rule for a mandamus to the corporation to grant a licence free from these conditions, and not to appeal to the Minister, and then, on the Minister making an order which does not set aside the decision of the corporation, to apply for a mandamus to the Minister: *Rex* v. *Minister of Transport. Ex parte Hull Road Motor and Electrical Engineering Co., Ld.* (1) The order of the Minister is "final and not subject to appeal to any Court," and as the applicants chose to appeal to the Minister they must abide by his order. The decision of the corporation was not, however, given in excess of jurisdiction, and accordingly the order of the Minister in affirming that decision on the same grounds was not made in excess of his jurisdiction. It is true that in *Rex* v. *Farnborough Urban Council. Ex parte Aldershot District Traction Co.* (2) it was held that a local authority in considering an application for licences for omnibuses is not entitled to take into consideration the fares charged by the proprietors of the omnibuses. That case, however, is distinguishable from the present case. That case was decided under the Town Police Clauses Acts, 1847 and 1889, and before the passing of the Roads Act, 1920. The Acts of 1847 and 1889 empower local authorities to make by-laws and impose conditions as to certain matters in respect of both hackney carriages and omnibuses, and in particular these Acts expressly give the authorities power to make by-laws and impose conditions as to fares in respect of hackney carriages, without giving them any corresponding power in respect of omnibuses; and that case decided that under these Acts a local authority could not impose upon an omnibus licence a condition as to fares. In the present case the decision of the corporation and the order of the Minister were made after the passing of the Roads Act, 1920, s. 14, sub-s. 3, of which contemplates that the licensing authority may grant an omnibus licence subject to conditions, without specifying any particular conditions, and therefore implies that the licence may now be subject to a condition as to fares.

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(1) [1926] W. N. 152.

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(1) Divisional Court, January 12, 13, 1927. Unreported.

(2) [1920] 1 K. B. 234.

There is also another distinction between the *Farnborough* case (1) and this case. In that case the district council imposed upon the licence a condition which affected the fares charged by the omnibus company with the sole object of fixing these fares. In the present case the corporation by their decision imposed upon the licence a condition which affected the fares charged by the omnibus company not with the mere object of fixing these fares, but with the object of securing in the public interest the maximum traffic facilities, both by preventing unnecessary competition with and reduction in the revenue of the corporation tramways, and by insuring that the accommodation in the omnibuses should not be filled up by short distance passengers to the exclusion of the long distance passengers.

Montgomery K.C. and *Paley Scott* for the Hull Corporation adopted the arguments on behalf of the Minister of Transport.

G. R. Mitchison for the applicants, the H. C. Motor Works, Ld., in support of the rules nisi.

These rules nisi for a certiorari to remove into this Court the order of the Minister and for a mandamus to him to hear and determine the appeal of the applicants to him from the decision of the corporation should be made absolute.

The order of the Minister affirmed the decision of the corporation refusing to grant to the applicants an omnibus licence, except subject to a condition fixing the fares to be charged by the applicants. That order purported to be made under the Roads Act, 1920, s. 14, sub-s. 3, the first paragraph of which provides that where the licensing authority either refuses to grant a licence or grants it subject to conditions,

(1) [1920] 1 K. B. 234.

the applicant shall have a right of appeal to the Minister, who shall have power to make such order as he thinks fit. That provision means that the Minister shall have power to make such order as he thinks fit within the scope of his jurisdiction. The order of the Minister was not within his jurisdiction if the decision of the corporation which it affirmed was made without jurisdiction. The decision of the corporation was in excess of their jurisdiction, inasmuch as it was that the licence would only be granted subject to a condition as to fares.

The corporation had no power to impose upon an omnibus licence a condition as to fares. The Towns Police Clauses Acts, 1847 and 1889, give to the local authority power to make by-laws and to impose conditions of certain kinds in respect of both hackney carriages and omnibuses, and s. 68 of the later Act gives to the local authority in express terms power to make by-laws fixing the fares for hackney carriages, but no corresponding power is given in respect of omnibuses. These Acts have given to the local authority power to grant an omnibus licence subject to certain conditions, but they have deliberately withheld from it the power to grant an omnibus licence subject to a condition as to fares. In *Rex* v. *Farnborough Urban Council* (1) it was held that a local authority in considering an application for licences for omnibuses is not entitled to take into consideration the fares charged on the omnibuses, which were treated as being an extraneous matter. The Roads Act, 1920, does not give to the licensing authority any power of imposing conditions upon omnibus licences greater than it already possessed. The reference in s. 14, sub-s. 3, to the licensing authority granting an omnibus licence subject to conditions does not imply that the licensing authority is to have power to grant the licence subject to any new conditions other than those which it could at that time by law impose. If that sub-section gives to the licensing authority any extended power of imposing new conditions upon omnibus licences, it cannot, in the absence of any express provision to that effect, confer power to impose a condition as to fares, which the Town Police Clauses Acts by implication provide and which the *Farnborough* case (1) decides is not to be imposed. The sub-section cannot be construed as meaning that the licensing authority is to have power to impose whatever conditions it may choose, because if it were so construed, different licensing authorities might impose inconsistent conditions and thus cause great inconvenience. It is true that the *Farnborough* case (1) was decided before the Roads Act, 1920, came into force, but at the time when that case was decided there was in existence a statutory provision substantially identical with s. 14, sub-s. 3, of that Act—namely, s. 12 (*b*) of the Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50)—and it cannot be supposed that that provision was disregarded by the Court in deciding that case. The case of *Rex* v. *Bradford Corporation* (2) only decided that the licensing authority has power to grant a licence subject to conditions which are within its ambit. Where a local authority is empowered to grant a licence for the doing of an act it may be that they are by implication authorized to grant the licence, subject to certain conditions, but these conditions must be reasonable: *Rossi* v. *Edinburgh Corporation* (3); and where a local authority is empowered to license omnibuses conditions imposed by the authority as to the fares to be charged by the omnibus proprietor are unreasonable. Sect. 14, sub-s. 3, in providing in respect of the appeal from the licensing authority to the Minister that the Minister shall have power to make such order thereon "as he thinks fit" does not give the Minister an unfettered discretion: *Reg.* v. *Adamson.* (4) The only matters which the Minister can take into consideration on the appeal are matters which were properly before the licensing authority and such other matters as the Minister is given a special power to decide. Neither the licensing authority nor the Minister had power to consider the fares charged by the applicants upon their omnibuses.

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(1) [1920] 1 K. B. 234.

(1) [1920] 1 K. B. 234.
(2) [1926] W. N. 152.
(3) [1905] A. C. 21.
(4) (1876) 1 Q. B. D. 201.

The applicants adopted the proper procedure in applying for these rules nisi directed to the Minister for a mandamus to compel him to determine the appeal according to law and for a certiorari to remove his order into this Court on the ground that he did not properly exercise or exceeded his jurisdiction in considering extraneous matters—namely, the fares to be charged by the applicants. The application for these rules is not an "appeal" within the meaning of the provision in s. 14, sub-s. 3, that the order of the Minister shall be final and not subject to appeal to any Court: see per Lord Sumner in *Rex* v. *Nat Bell Liquors, Ld.* (1) If, as suggested, the applicants, instead of appealing from the decision of the corporation to the Minister, had applied for a rule for a mandamus to the corporation to grant an unconditional licence, the application would have been refused on the ground that the applicants had another equally effective remedy in an appeal to the Minister: *Rex* v. *Comptroller-General of Patents. Ex parte Muntz* (2); *Rex* v. *Port of London Authority. Ex parte Kynoch, Ld.* (3) The applicants are entitled to both a writ of mandamus and a writ of certiorari directed to the Minister: *Board of Education* v. *Rice.* (4)

Avory J. These are two rules, one for mandamus and one for certiorari, obtained at the instance of the H. C. Motor Works, Ld., addressed to the Minister of Transport, calling upon him to show cause why either a writ of certiorari should not issue to remove into this Court a decision contained in a letter of his dated November 19, 1926, or why a writ of mandamus should not issue commanding him to hear and determine an appeal by the applicants against the refusal of the Hull Corporation to grant to that company licences to ply for hire with omnibuses. In each case the rule is moved for upon the ground that the Minister in deciding, or purporting to decide, the appeal, did not properly exercise or exceeded his jurisdiction in that he considered and acted upon extraneous matter—namely, the fares charged and intended to be charged by the company upon the omnibuses referred to, and that he did not hear and determine the appeal according to law. For the purpose of my judgment and in the view I take it is not necessary to determine whether any distinction should be drawn in this case between the remedy by certiorari and the remedy by mandamus. The only ground upon which either of these applications can succeed is that the Minister in coming to his decision was influenced by extraneous considerations, that is, by matters which he had no right to take into consideration in determining the appeal. The question whether the Minister was so influenced is the only question before this Court.

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(1) [1922] 2 A. C. 128, 159.
(2) (1922) 38 Times L. R. 652.
(3) [1919] 1 K. B. 176.
(4) [1911] A. C. 179.

The corporation refused to grant licences, and it appears that they refused to grant them because the applicants refused to give an undertaking that they would charge certain fares upon their omnibuses which were running in Hull along the route upon which trams were running, the undertaking being limited to the fares charged upon the route already served by the trams. Upon the refusal of the corporation to grant the licences except upon that undertaking there was an appeal by the company to the Minister of Transport. The Minister came to his decision only after an inquiry had been held by an officer authorized by him for that purpose, and the grounds upon which the Minister came to his conclusion are set out in the affidavit before us of Mr. Henry Howard Piggott [as stated at p. 404, ante]. It is said that that affidavit of itself shows that the Minister has taken into his consideration the question of fares to be charged upon these omnibuses. In a sense no doubt that is true. It was impossible that he could consider the matter of this appeal without in some sense taking notice of the question of fares which it was proposed to charge upon these omnibuses. It is said, however, by Mr. Mitchison that in doing that he was acting contrary to a decision of this Court in the case of *Rex* v. *Farnborough Urban Council.* (1) That case was decided in October, 1919. It had reference to the refusal

(1) [1920] 1 K. B. 234.

of certain omnibus licences by the Farnborough Urban District Council in May, 1919, and undoubtedly it was a decision that a local authority, in considering an application for licences for omnibuses to ply for hire in its district, is not entitled to refuse to grant the licences on the ground that the fares charged or proposed to be charged are excessive. It appears that in that case the council had refused to renew the licences on two grounds, first, the refusal of the company to reduce its fares, and secondly, its refusal to adopt penny stages; and the Court came to the conclusion that in view of the provisions of the Town Police Clauses Acts, 1847 and 1889, the local authority, while they had power to make by-laws fixing the fares to be paid in hackney carriages, had no power to make by-laws fixing the fares to be charged in omnibuses. If matters had remained as they were in May, 1919, there might have been much greater difficulty in determining the present question. We have, however, to determine the question to-day in the light of the provisions of the Roads Act, 1920. In particular, s. 14, sub-s. 3, of that Act provides: "Where, upon application for a licence to ply for hire with an omnibus, the licensing authority either refuses to grant a licence or grants a licence subject to conditions, in either case the applicant shall have a right of appeal to the Minister of Transport from the decision of the licensing authority, and the Minister shall have power to make such order thereon as he thinks fit, and such order shall be binding upon the licensing authority. An order made by the Minister under this sub-section shall be final and not subject to appeal to any Court. . . . ." When the application was made in this case for the rule nisi Mr. Mitchison, in making the application, referred to the decision in *Rex* v. *Farnborough Urban Council* (1), and in reference to that case the Lord Chief Justice, after reading s. 14, sub-s. 3, made this observation: "Therefore you have these four elements: The licensing authority may grant a licence subject to conditions; upon appeal to the Minister he shall make such order as he thinks fit; the order made by the Minister shall be final; and that order shall not

(1) [1920] 1 K. B. 234.

be subject to appeal to any Court. That was not the law when the *Farnborough* case (1) was decided." The Lord Chief Justice was there pointing out by anticipation that the question of the effect of the decision in the *Farnborough* case (1) would have to be considered in the light of the provisions of s. 14, sub-s. 3, of the Roads Act, 1920. Reference may also be made to some further observations of the Lord Chief Justice in the case of *Rex* v. *Minister of Transport. Ex parte Hull Road Motor and Electrical Engineering Co.* (2), decided in this Court on January 13 of this year, of which we have been furnished with a shorthand note. That case was determined upon the ground of the undue delay in making the application, but in the course of his judgment the Lord Chief Justice said: "With regard to the question which becomes in these circumstances a question of less importance—whether it is true to say that the Minister of Transport did in fact refuse to hear and make an order upon the company's appeal—it seems to me to be quite clear that he did, at any rate, entertain the appeal. He sent a representative to hold a local inquiry at which witnesses on the one side and on the other were heard for a period of two days. If, after making that inquiry, and equipping himself with that information, the Minister of Transport had written in plain terms that he had heard the appeal, that he had ascertained the facts, and that he had considered the conditions which were complained of, and then dismissed the appeal, there would not have been a word to say." That passage in the judgment of the Lord Chief Justice in that case would seem to apply equally in this case. Here also the Minister has held the inquiry; has heard the appeal; has considered the conditions upon which the local authority were willing to grant the licences, and without which they refuse to grant them; and has given his decision in the words which I have quoted from the affidavit. The question is whether there was anything here which justifies us in saying, or which compels us to say, that, in coming to

(1) [1920] 1 K. B. 234.

(2) Divisional Court, January 12, 13, 1927. Unreported.

this decision, the Minister has taken into consideration matters which were extraneous, and which he ought not to have considered. In my view the Minister in this case was considering the public convenience in view of the fact that there was an existing tramway on a part of this route. It is clear that both the corporation and the Minister were aiming at doing nothing to interfere with the through journey of these omnibuses from Hull to Hessle, and that all that they had in mind was to provide that the public convenience should not be interfered with by these omnibuses running alongside the tramway in the city of Hull in such a way as would in their opinion be in conflict with the public interest. If incidentally to the consideration of that question the Minister could not shut his eyes to the question of the fares, I do not think it can properly be said that he was influenced by any extraneous consideration in determining what was best in the public interest. On that short ground I think that both these rules ought to be discharged.

Swift J. I agree, and I have nothing to add.

Talbot J. I am of the same opinion. The appeal to the Minister from the refusal of the corporation to grant the omnibus company their licences was based upon the contention that the corporation had no legal right directly or indirectly to fix or control fares in respect of any of the company's omnibuses plying for hire within the city. It was quite clear that the corporation had refused to grant or renew the licences on a ground connected with the fares charged by the omnibus company—namely, that they had failed to comply with the condition upon which they had previously held licences, to charge a minimum fare of not less than a penny in excess of the tramway fare on the Hull and Hessle route, and had refused to comply with any such condition. Upon that appeal, brought to him upon that ground, the Minister informed the company that he had decided to make no order, and in the affidavit sworn by a gentleman in the office of the Ministry of Transport the ground was made clear upon which the Minister had so decided. The affidavit says that in the circumstances of this case the Minister considered it essential in the public interest that some arrangement should be made to discourage the use of the company's vehicles for the carriage of short distance passengers on that portion of the route which is served by the tramway system, that in the absence of an arrangement which would have that effect he would not be prepared to order the issue of licences, and that the Minister was not aware of any arrangement other than an undertaking on the lines of that required by the licensing authority which would legally secure that effect.

The matter arises in this way: The route along which these omnibuses ply from Hull to Hessle consists partly of a section in the urban district of Hessle outside the city of Hull, and partly of a longer section inside the city along the greater part of which is laid a tramway belonging to the corporation. The corporation, (and the Minister agrees with them), are of opinion that there is needed along this road a service for persons wishing to go from Hull to Hessle, and from Hessle to Hull, but that there is not needed otherwise a service of omnibuses along the part of the road in which the tramway of the corporation is laid; that not only is the last mentioned service not needed, but that it would have an injurious effect upon the provision of traffic facilities for the public by depleting the revenue of the corporation tramway, and also by diminishing the facility which passengers intending to travel along the whole of the road would get, inasmuch as part of the accommodation which would otherwise be available for them would be occupied by short distance passengers. In those circumstances the corporation and the Minister had to consider some way by which it could be secured that the service which provided for the long distance passengers should not be available for short distance traffic. As the Minister explains in the affidavit, it appeared to him that the only way—at any rate the only way suggested—and the most effective and reasonable way of doing that was by means of fares. It had been suggested, apparently for some time, that the object could be attained if a pecuniary inducement was given to passengers to travel by tramway so far as the tramway was available, by making the fare on the tramway less than the fare by the omnibus; and it was with that object, and that only, that the corporation in the first place, and the Minister on appeal, purported to deal with this matter of fares. These rules were applied for on the ground that the Minister, in purporting to decide the appeal, did not properly exercise, or exceeded, his jurisdiction, or declined jurisdiction, in that he considered and acted upon extraneous matter—namely, the fares charged, and intended to be charged, by the company upon the omnibuses referred to, and that he did not hear and determine the appeal according to law. The words of s. 14 of the Roads Act, 1920, have already been read, and I need not repeat them. They are in the widest possible terms, and the Minister is there given power to make such order on the appeal as he may think fit. It is said, however, that because, in order to achieve an object which so far from being extraneous is in the closest degree appropriate to the exercise of this jurisdiction—namely, the provision of an omnibus service to the extent, and to the extent only, that it is needed by the public—the Minister approved of the machinery of the differential fare by which alone that object is to be attained, therefore he has considered extraneous matter. The argument in support of that contention is based, and, having listened to the very full and careful argument of counsel in support of the rule, I think is based only, upon the case of *Rex* v. *Farnborough Urban Council.* (1) It is said that that case has laid down a binding rule of law to the effect that in no case is an authority which has to consider the question of a licence to an omnibus, to consider, any question of fares or to do anything which will have any effect in regulating fares. Speaking for myself, if I thought that was a fair and just representation of the effect of that authority, I see nothing in the Roads Act, 1920, which would cut down or impair it. I do not think that the language of the Roads Act, 1920, either in respect of conditions, or in respect of the powers given to the

(1) [1920] 1 K. B. 234.

Minister on appeal, would avail to allow either the corporation or the Minister to consider the question of fares if that case had laid down such a binding rule of law as is suggested. But it appears to me that that is quite an illegitimate way of using this authority. The question there was a totally different one. An omnibus company wanted licences within the urban district of Farnborough. The district council tried to make the grant of the licences conditional on the fares not exceeding a certain maximum scale which they prescribed. That was, of course, solely in the interests of the passengers by the omnibuses in order to enable them to travel by the omnibuses at as cheap a rate as the district council thought could be secured. It was said that they had no power to do that upon this one ground, and it was upon this ground only that the Court decided the case, that the council were, in effect, doing that which they could do with regard to hackney carriages, that is to say, limiting the fares which those carriages can charge, but could not do in regard to omnibuses. It was said that the Town Police Clauses Act, 1847, which regulates these matters, gives to local authorities with regard to hackney carriages power under which the fares of those carriages are limited, but has deliberately abstained from extending those provisions to omnibuses, and that when the question of licensing omnibuses was dealt with by Parliament, they deliberately refrained from giving powers in respect of omnibuses such as were given in respect of hackney carriages. It was said that the council were trying by their action, with regard to these licences, to do that indirectly which they could not do directly—namely, fix the fares to be charged by omnibuses. Speaking for myself, I think that decision, like all decisions, should be read in the light of, and according to the subject-matter which was there dealt with.

The whole object of the decision which we are discussing here, first of the Hull Corporation, and, secondly, of the Minister of Transport on appeal, is altogether outside that case, and altogether outside the purview of the Town Police

Clauses Act, 1847, which regulates the fares of hackney carriages. It is simply a piece of machinery in order to accomplish that which the Minister says cannot otherwise be accomplished and which, in his opinion, and in the opinion of the corporation, is in the public interest. It is emphatically one of those matters which the corporation and the Minister have to consider under the Roads Act, 1920—namely, to secure that the omnibus service for which licence is sought shall be such as provides in the most efficient way for the convenience of the public by giving the public an additional facility which is needed, without interfering with and injuring other public services which exist, and that it should be so managed and arranged that it should confine its operation, so far as possible, to the provision of that for which it is needed. It seems to me quite impossible to say that the decision in the case of *Rex* v. *Farnborough District Council* (1), given upon a totally different subject-matter, and with reference to totally different considerations, can be a binding rule of law such as is suggested or can constitute an exception to the power to make orders and to grant licences, or refuse to grant licences, conferred by s. 14 of the Roads Act, 1920 In my opinion that is not a reasonable way of construing either the Act of Parliament or the decision, and I agree, therefore, that both these rules ought to be discharged.

Orders nisi discharged.

Solicitor for Minister of Transport: *The Treasury Solicitor.*

Solicitors for Hull Corporation: *Sharpe, Pritchard & Co., for the Town Clerk, Hull.*

Solicitors for applicants: *Cunliffe, Blake & Mossman, for Moss, Lowe & Co., Hull.*

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(1) [1920] 1 K. B. 234.

J. R.

ROYAL COMMISSION ON THE SUGAR SUPPLY *v.* HARTLEPOOLS SEATONIA STEAMSHIP COMPANY, LIMITED.

1927
May 23.

Charterparty—Bill of Lading—Conclusive Evidence Clause—" Unless error or fraud can be proved "—" Error "—Proof of—Discrepancy between Bill of Lading Number of Bags loaded and Number of Bags discharged—No Evidence to show how Discrepancy arose—Finding that all Bags shipped were discharged.

A charterparty contained clauses which provided that bills of lading should be signed in accordance with mate's receipts, and "quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless error or fraud can be proved." The ship loaded a full and complete cargo of sugar in bags including a parcel of sugar marked " San Lino," in respect of which the mate gave a receipt for 2860 bags in accordance with the tallies and the captain signed a bill of lading for 2860 bags. When the ship was discharged the out-turn tallies showed only 2677 bags of sugar of the " San Lino " mark, and the claimants, who were the charterers and consignees of the sugar, claimed against the shipowners in respect of the shortage of 183 bags. On reference to arbitration no attempt was made to prove by direct evidence that any error had arisen in making out the bill of lading, or that the tallies were inaccurate, or that they had been wrongly cast, or that entries had been duplicated, or that they contained mistakes of any kind. The arbitrator found that all the bags of sugar shipped under the mark " San Lino " were discharged and that there was no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose. The shipowners contended that an " error," within the meaning of the conclusive evidence clause, had been proved by, or might be inferred from, evidence that all the sugar shipped had been discharged :—

Held, that it was for the shipowners to prove that they came within the condition or limitation in the conclusive evidence clause upon which they relied, and that in order to do so it was not enough for them to give evidence from which it might be inferred that a mistake had been made in the bill of lading ; there must be actual proof of a mistake to show how the discrepancy arose.

Award stated by an arbitrator in the form of a special case.

By a charterparty dated March 10, 1920, and made between the Hartlepools Seatonia Steamship Company, Ld. (hereinafter called " the respondents "), as owners of the steamship *Seatonia*, of the one part, and the Royal Commission on the Sugar Supply (hereinafter called " the claimants "), of the other part, it was agreed that the said steamship should proceed to certain ports in Cuba and there load a full cargo of sugar in bags, and being so laden should proceed, as ordered, to one safe port in the United Kingdom and there deliver the same upon being paid the freight and upon the terms and conditions therein appearing.

Certain differences and disputes arose between the parties under and arising out of the charterparty which were referred to Mr. Claughton Scott K.C. as sole arbitrator, who stated his award in the form of a special case for the opinion of the Court.

1. The short question for the opinion of the Court was whether upon the facts found by the arbitrator, and upon the true construction of the charterparty and the bills of lading, the respondents were liable to the claimants in respect of an alleged short out-turn of sugar at Greenock in June, 1920.

2. The charterparty of March 10, 1920, provided (inter alia) that the steamship *Seatonia* should proceed to one or two ports in Cuba and there load a full and complete cargo of sugar in bags, about 4500 tons, 10 per cent. more or less, and being so laden should proceed, as ordered, to one safe port in the United Kingdom and there deliver the same on being paid freight at the rate therein provided.

3. The charterparty also provided:

"Mate's receipts to be signed for each parcel of sugar when on board, and captain to sign bills of lading in accordance therewith as requested by shippers."

"Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless error or fraud can be proved."

4. The said steamship duly proceeded to Cuba and loaded at two ports—namely, at Manzanillo and Cienfuegos, a full and complete cargo of sugar in bags.

5. As to the cargo loaded at Manzanillo no question arose in this dispute. As to the cargo loaded at Cienfuegos the bags were tallied by the same tallymen on behalf of the shippers and the ship. The mate duly signed receipts for each parcel of sugar received on board. The captain signed

bills of lading for each parcel which (save in certain respects which were not material to this issue) were in accordance with the mate's receipts.

6. The cargo was loaded at Cienfuegos, partly from alongside a railway pier and partly from lighters. It was put straight into the holds; hatches and tarpaulins were put on each night; and an A.B. was put on night duty. Each bag of sugar weighed upwards of 300 lbs.

7. The claimants alleged that a shortage of out-turn of 183 bags of sugar arose in a parcel of 2860 bags of sugar marked "San Lino." In respect of this parcel the tallies at Cienfuegos showed 2860 bags of sugar, the mate gave a receipt for 2860 such bags; and the captain (as appears hereafter) signed a bill of lading in accordance with these documents—namely, for 2860 such bags. The claimants paid the shippers for the sugar in accordance with and relying on the said tallies.

8. By the "Berth Terms Bills of Lading" dated Cienfuegos (Cuba) May 15, 1920, the captain acknowledged to have "received in apparent good order and condition from Marcelino Garcia on board the good steamship *Seatonia* . . . . three thousand bags centrifugal sugar weighing gross 947,026 English lbs., weighing net 939,526 English lbs. as per margin, shippers' weights (weight, quality, gauge, contents and value unknown to the undersigned), to be delivered in like good order and condition at port of destination unto Royal Commission on the Sugar Supply. . . . ."

9. The bill of lading further provided:—

"It is mutually agreed . . . . that the carrier shall not be liable for any loss or damage arising from the insufficiency of packages . . . . and that the carrier shall not be concluded as to the correctness of statements herein of quality, quantity, gauge, contents, weight and value."

"In accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all its stipulations, exceptions and conditions whether written or printed as fully as if they were all signed by such shipper, owner or consignee."

10. The margin of the bill of lading contained the following:

"San Lino	2860	Centrifugal Sugar.
"Portugalete	140	,, ,,
	3000	bags."

and two clauses: "All other conditions and exceptions as per charterparty or any other agreement covering this shipment: washed or unmarked bags in this lot to be considered as cargo bags and are to receive full credit as such on delivery." "A considerable number of bags broken, dirty or wet for which ship is not responsible. Ship not responsible for mixture of cargo with any other parcel."

11. The said steamship touched at Norfolk for bunkers, where her hatches were not opened, and sailed thence to Greenock, to which port she had been ordered. She arrived at Greenock on June 13, 1920, and began to discharge her cargo without delay. The claimants were the receivers of the cargo.

12. In accordance with the practice at Greenock, the cargo was tallied and weighed on the Quay, alongside the ship, by sworn licensed weighers, who were paid partly by the ship and partly by the receivers. Some of the cargo was loaded into carts and sent direct to the refiners, some was placed in a shed and delivered later to the refiners. In the usual course of business Customs officials tallied the sugar before it was sent to the refiners, and the refiners also kept a tally. As to the "San Lino" mark each of these three tallies showed 2677 bags of sugar only, that is to say a shortage of 183 bags of sugar on the bill of lading number. Torn bags were tallied and counted as "bags of sugar"; no bags were completely empty. There was a normal amount of loose collected and sweepings.

13. The claimants claimed in respect of this alleged shortage the sum of 1460*l*. 11*s*. 1*d*. and deducted that sum from the respondents' freight account. The respondents thereupon decided to institute proceedings for the recovery of the sum in question and invited the claimants to submit the dispute to arbitration. The claimants paid the respondents the

said sum of 1460*l.* 11*s.* 1*d.* and thus became claimants in the arbitration.

14. The parties delivered points of claim and points of defence in these proceedings. The claimants based their claim upon the charterparty and the "conclusive evidence" clause therein. The respondents relied upon the terms of the bills of lading; they denied that the bills of lading numbers of bags were received on board, and alleged that all the bags received on board were discharged at Greenock.

15. The only facts proved before the arbitrator as to the loading at Cienfuegos were those set out in paras. 5 and 6 hereof. The abstract of the tallies at Cienfuegos was produced. No attempt was made to prove by direct evidence that any error had arisen in making out the bill of lading, or that the tallies were inaccurate, or that they had been wrongly cast, or that entries had been duplicated, or that they contained mistakes of any kind. With regard to the other marks loaded at Cienfuegos the total of the numbers stated in the bills of lading corresponded with the total of the out-turn tallies. Fraud was not suggested.

16. The respondents contended, and brought evidence with a view to proving: (1.) that the out-turn tallies at Greenock could not be relied upon and that in consequence the claimants had failed to prove any shortage; (2.) that all the sugar received on board had been delivered at Greenock. They contended that if the out-turn tallies were correct and all the sugar received on board had been delivered, they had proved that the number of bags of sugar stated on the bill of lading was erroneous within the meaning and requirement of the charterparty.

17. The respondents submitted that the following points of law arose for decision in this case—namely:—

(i.) What on their true construction do the words "unless error or fraud can be proved" mean? Is it necessary that the error should be a patent error, or may it be proved by or inferred from evidence that all the sugar shipped was discharged?

(ii.) Whether in view of the qualifications in the bill of lading for the "San Lino" parcel: (*a*) "It is mutually agreed . . . . that the carrier shall not be concluded as to the correctness of statements herein of quality, quantity, gauge, contents, weight and value." (*b*) "A considerable number of bags broken, dirty or wet, for which ship is not responsible. Ship not responsible for mixture of cargo with any other parcel"—the statement of quantity in the said bill of lading can be construed as being a definite statement that any particular number of bags were shipped.

(iii.) Whether the bill of lading as qualified taken in conjunction with the provision in the charterparty is conclusive evidence against the respondents save proof by them of error or fraud of the number of bags of sugar shipped or of the number of bags shipped.

18. It was contended by the claimants that the word "error" in the charterparty meant error in the real sense of that word, for example, a copying error, or an error as to counting or the like.

19. The arbitrator, in so far as it was a question of fact, found, and in so far as it was a question of law held, subject to the opinion of the Court upon the points of law hereinafter mentioned:—

(*a*) That the out-turn tallies at Greenock were correct and that only 2677 bags of sugar marked "San Lino" were unloaded and delivered.

(*b*) That all the bags of sugar shipped under the mark "San Lino" were discharged and delivered.

(*c*) That there was no evidence to show how this discrepancy between the bill of lading number and the out-turn number arose.

(*d*) That notwithstanding the qualifications in the bill of lading set out above, the number of bags of sugar stated in the bill of lading was a definite statement that that number of bags of sugar had been shipped.

(*e*) That the bill of lading taken in conjunction with the provision in the charterparty was conclusive evidence against the respondents as to the number of bags shipped, save on proof by them of error or fraud in regard thereto.

(*f*) That the words "unless error or fraud can be proved" meant, upon the true construction of this charterparty, unless some definite error in making out the bill of lading or in the tallies such as clerical error or error in copying or addition or omission or the like or some definite fraud be proved, and that it excluded proof by, or inference from, the fact that all the bags of sugar shipped were discharged.

(*g*) The value of 183 bags of sugar of the "San Lino" mark was 1460*l.* 11*s.* 1*d.*

20. The arbitrator awarded and determined (subject to the opinion of the Court upon the questions hereinafter submitted) that the respondents should pay to the claimants the sum of 1460*l.* 11*s.* 1*d.*

21. The question for the opinion of the Court was whether upon the facts found by the arbitrator, and upon the true construction of the charterparty and bill of lading the arbitrator came to a correct determination in point of law.

G. P. Langton K.C. and *Guy E. Cooper* for the respondents. The effect of the conclusive evidence in the charterparty has been wiped out by the insertion in the bill of lading of the words: "The carrier shall not be concluded as to the correctness of statements herein of . . . . quantity." Secondly, the shipowners, even if wrong on the first point, are entitled to escape liability for the bill of lading quantity by reason of the qualifying words in the conclusive evidence clause in the charterparty "unless error or fraud can be proved." The word "error" in that clause is not confined to a clerical error or to an error that is apparent on the face of the documents. The clause specifies for the proof of the error or fraud that is to operate as an excuse. "The word 'proof' seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition; and as truths differ, the proofs adapted to them differ also . . . . the proofs of matters of fact in general are our senses, the testimony of witnesses, documents, and the like": Best on Evidence, 12th ed., p. 5. Fraud can only be proved in a Court of law in a strict manner, so also error can only be proved in a Court of law or in an arbitration, and the term does not refer to a clear mistake, as, for example, in the addition of a number of tallies. An "error" need not be blameworthy, but it does not therefore follow that it may not be very serious. In the present case some one made a mistake in tallying in the sugar, but there is no reason why the term "error" should be confined to something which is arithmetical or which appears on the face of a document. There must have been an error in counting the bags before the number got on to the tally, and that is an arithmetical error.

[MACKINNON J. The arbitrator has found that there is no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose.]

In *Lishman* v. *Christie & Co.* (1) it was held, there being a conclusive evidence clause in the charterparty, that the bills of lading estopped the plaintiff from denying that the full amount of cargo stated therein was shipped. But in that case there were no qualifying words to the conclusive evidence clause, as there are in the present case. In *Crossfield & Co.* v. *Kyle Shipping Co.* (2), also the conclusive evidence clause was an absolute one, without any qualifying words. On the other hand, in *Lohden & Co.* v. *Calder & Co.* (3) it was held that shipholders were not estopped by the terms of the bill of lading from showing that part of the goods were not shipped. In that case there was a marginal note added to the bill of lading which had the effect of nullifying the conclusive evidence clause. In this case the receipt in the bill of lading, having regard to the words "the carrier shall not be concluded as to the correctness of the statements herein," was not an unqualified receipt. The charterparty and the bill of lading must be read together, and so read the statement in the bill of lading is not conclusive as to the quantity of sugar shipped. Where the charterer himself ships the cargo and takes a bill

(1) (1887) 19 Q. B. D. 333.
(2) [1916] 2 K. B. 885.
(3) (1898) 14 Times L. R. 311.

of lading for the shipment it is sometimes said that such a bill of lading as between the charterer and the shipowner is to be taken only as an acknowledgment of the receipt of the goods: see *Rodocanachi Son & Co.* v. *Milburn Brothers* (1), per Lord Esher. But it is clear from *Gullischen* v. *Stewart & Co.* (2) that the contract made between shipowner and charterer in the charter may in effect be varied by the bill of lading: see Scrutton on Charterparties, 12th ed., p. 56.

Sir Thomas Inskip S.-G. and *W. Bowstead* for the claimants. The contention put forward on behalf of the respondents, if effect were given to it, would mean the deletion of the conclusive evidence clause from the charterparty. That clause prima facie must mean something; it obviously was put in the charterparty in order to protect the claimants and prevent them from being obliged to pay for sugar which had not been shipped. Swinfen Eady L.J. in *Crossfield & Co.* v. *Kyle Shipping Co.* (3) said: "I am of opinion that no encouragement should be given to a practice of signing clean bills of lading for goods which the master knows have not been put on board, and with the intention that the actual shipment shall be subsequently disputed." By the clause in the charterparty the statement in the bill of lading as to quantity is to be conclusive proof as to number of bags shipped unless error or fraud can be proved. "Fraud" must clearly mean the fraud of some one other than the shipowner, because he could not rely as an excuse upon his own fraud. Equally "error" must mean some error on the face of the documents which would become apparent on the production of the documents, e.g., a discrepancy between the mate's receipts and the statement of quantity in the bill of lading. The arbitrator has found that there was no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose. The clause requires proof of the error. In the absence of proof one is left to conjecture whether the discrepancy is due to error or fraud. It is not enough for the shipowners to say that all the bags of sugar put on board were discharged; the error must be proved. If the contention for the respondents is correct and "error" includes all discrepancies, then there is no reason for including "fraud" in the clause.

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(1) (1886) 18 Q. B. D. 67, 75.

(2) (1884) 13 Q. B. D. 317.

(3) [1916] 2 K. B. 893.

Langton K.C. replied.

MACKINNON J. This case raises one of the shortest points possible, but one of characteristic difficulty.

The Royal Commission on the Sugar Supply, by a charter dated March 10, 1920, chartered the steamship *Seatonia* to go to Cuba and load a cargo of sugar. It was provided by the charterparty that mate's receipts were to be signed for each parcel of sugar when on board, and the captain was to sign bills of lading in accordance therewith as requested by shippers. It was then provided later on—and this is the clause upon which the question in this case turns—"Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless fraud or error can be proved." At one of the ports in Cuba a parcel of sugar marked "San Lino" was shipped or tendered to the ship. The mate signed a receipt for 2860 bags of that mark and, pursuant to the clause in the charterparty, the master signed the bill of lading, dated May 15, 1920, on which the amount of sugar shipped under that bill of lading was stated in the margin to be "'San Lino' 2860 bags centrifugal sugar," and a further parcel of another mark. It was provided by a clause in the body of the bill of lading "that the carrier shall not be concluded as to the correctness of statements herein of"—among other things—"quantity." When the ship arrived at Greenock her cargo was tallied on discharge and only 2677 bags of sugar marked "San Lino" were purported to be found by the tallymen superintending the discharge. The Royal Commission, in arbitration, claimed from the shipowners the value of 183 bags of "San Lino" sugar, the difference between 2860, the number of bags in the bill of lading, and 2677, the number of bags discharged.

Two points arise, first whether the shipowners can say that the whole effect of the conclusive evidence clause in the charterparty was wiped out by the insertion in the bill of lading of the words "The carrier shall not be concluded as to the correctness of statements herein of . . . . quantity"; and secondly, if the shipowners fail on that point, they can still say that they escape liability by reason of the provision in the charterparty in the conclusive evidence clause of the limitation "unless error or fraud can be proved."

The arbitrator, who stated this case, has found first: "That the out-turn tallies at Greenock were correct and that only 2677 bags of sugar marked 'San Lino' were unloaded and delivered"; secondly: "That all the bags of sugar shipped under the mark 'San Lino' were discharged and delivered"; thirdly: "That there was no evidence to show how this discrepancy between the bill of lading number and the out-turn number arose." Those first two findings involve necessarily a conclusion that the figure of 2860 inserted in the bill of lading was inaccurate or erroneous, because in fact only 2677 bags can have been shipped, and the figure in the bill of lading ought to have been 2677 and not 2860. But he has further found that there was no evidence to show how this discrepancy between the bill of lading number and the true figure of 2677 arose. The question, upon those facts is whether the shipowners are liable upon this claim for the shortage of 183 bags.

As to the first point raised by the shipowners I think there is no difficulty whatever. This is a claim by the charterers against the shipowners, and the contention of the shipowners must amount to a suggestion that the charterers and shipowners by mutual agreement varied the terms of the charterparty when they signed the bill of lading, so as to substitute the words put in the bill of lading about the carrier not to be concluded by the statements herein as to quantity for the conclusive evidence clause in the charterparty. In my opinion that contention is not sound. The shippers, the agents of the charterers, and the master would have no authority to vary the charterparty, and it is very old law that variations between the charterparty and the bill of lading, as between the charterer and the shipowner, are to be accounted of no effect at all, the bill of lading being merely a receipt for the goods, and any form of printed words in the bill of lading would be equally immaterial.

The real question in this case arises under the conclusive evidence clause in the charterparty. That clause is: "Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped." Pausing there that means clearly that the number of bags stated in the bills of lading shall be conclusive upon the shipowner of the number of bags shipped. Then there is added a qualification, "unless error or fraud can be proved." In one sense, as I have already said, the findings of the arbitrator taken together clearly involve a finding, although he has not expressly so found, that the figure of 2860 in this bill of lading was erroneous; it ought to have been 2677. That has been proved, because the arbitrator has been driven to that conclusion and has found it as a fact. It has been proved to him by a necessary inference from two other facts that have been proved, namely that no bags were in any way lost or disposed of after shipment, and that only 2677 bags were landed. Mr. Langton contends that in those circumstances error has been proved within the meaning of this clause. It is quite obvious that if that contention be accepted, the whole of this clause might just as well never have been inserted in the charterparty at all; but I do not say that that is necessarily any solid ground for arguing that a clause in a charterparty must have a particular meaning, because frequently words are used as to which such a result could be suggested. I think there is another aspect of it that is very significant. If Mr. Langton's argument about this clause is correct, not merely is the whole clause rendered valueless to the charterer who is making this stipulation about the quantity in the bill of lading being conclusive evidence, but some words in the qualification itself are otiose and clearly unnecessary. If his contention were correct it would apply if any mistake were proved by any satisfactory means whatever, it would not matter whether the mistake arose by carelessness or negligence or fraud. In my opinion, however, the words "unless error or fraud can be proved" afford a strong reason for thinking that something else is contemplated than a mere difference between the figure in the bill of lading and the true figure. The Solicitor-General suggests further that reading the conclusive evidence clause from the beginning to the end one must give effect to it unless error or fraud can be proved, and that it is not enough to get rid of the effect of that clause by saying that one must infer from the facts that there has been a mistake.

I think this is an extremely difficult question, but upon the whole I agree with the view of the learned arbitrator. I think it is for the shipowner, who is relying upon the latter part of the conclusive evidence clause, to satisfy the arbitrator and this Court that he comes within the condition or limitation upon which he relies. I do not think it is enough for him merely to give evidence from which one can infer, or say that it is a necessary inference, that a mistake has been made as regards the figure put in the bill of lading. I agree with the learned arbitrator in thinking that what is intended by the clause is actual proof of the error, as for example, by comparison between the mate's receipts and the bill of lading, or some other document, so that the source of the discrepancy between the two can be pointed out. Nothing of the sort was proved in this case because, as the learned arbitrator has found, there was no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose.

In those circumstances I think that the award of the learned arbitrator was right and that his award should be upheld.

Award upheld.

Solicitor for claimants: *The Solicitor to the Board of Trade.*

Solicitors for respondents: *Middleton, Lewis & Clarke, for Middleton & Co., West Hartlepool.*

R. F. S.

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April 28, 29;
May 2, 3, 4,
5, 6, 9, 10,
11, 23.

GOSSE MILLARD *v.* CANADIAN GOVERNMENT MERCHANT MARINE, LIMITED.

AMERICAN CAN COMPANY *v.* SAME.

[1926. G. 238.]

[1926. A. 214.]

Shipping—Bill of Lading—Delivery of Cargo in damaged Condition—Cause of Damage unexplained—Liability of Shipowner—Onus of Proof—Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Schedule, Art. III., r.* 2.

Art. III., r. 2, of the Schedule to the Carriage of Goods by Sea Act, 1924, provides that: "Subject to the provisions of Art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Where goods are carried under a bill of lading under the Act and their owner proves that they have been discharged from the ship in a damaged condition, but the cause of the damage is unexplained, Art. III., r. 2, does not require the owner of the goods to prove that the carrier has been negligent in dealing with them; the burden of proof is on the carrier to show that he has exercised reasonable care and bring himself within the immunities specified in Art. IV. of the Schedule to the Act.

The onus of claiming the benefit of the immunities specified in Art. IV., r. 2, which is expressly stated to be on the carrier who seeks to bring himself within para. (*q*) of the Rule, is laid by implication on the carrier who invokes the protection of one or more of the other paragraphs, because he has to relieve himself of the prima facie breach of contract involved in his failure to discharge the goods in condition as received.

ACTIONS in the Commercial List tried by Wright J. without a jury.

The plaintiffs in both actions claimed from the defendants damages for alleged breach of duty and/or contract in and about the carriage of certain tinplates in the defendants' steamship *Canadian Highlander.*

On February 4, 5 and 6, 1925, about 20,000 boxes of tinplates, of which the plaintiffs were the owners and/or consignees, were shipped at Swansea in good order and condition on board the *Canadian Highlander*, under a bill of lading of which the plaintiffs were holders, to be delivered by the defendants at Vancouver, British Columbia. On February 8 the ship arrived at Liverpool, and on February 9 lumber cargo was discharged. On February 10 the ship collided with the dock head in coming out of the dock, and received damage which kept her in dock until early in April, when she resumed her voyage. She arrived at Vancouver on May 17, and it was then found that a large quantity of the goods were rusty, stained and depreciated by contact with fresh water.

The plaintiffs alleged that this damage was due to the defendants' failure properly and carefully to load, stow, carry, keep, care for and discharge the goods, or, alternatively, that the defendants were negligent in the loading, stowage, carriage, custody, care and discharge of the goods.

The defendants denied that they failed properly or carefully to load, stow, carry, keep, care for and discharge the goods, or that they had been guilty of negligence, and they claimed to be immune from responsibility for the damage under Art. IV., r. 2 (*a*), (*c*), (*d*), (*i*) and (*q*), of the Schedule to the Carriage of Goods by Sea Act, 1924.

The judge, after a full examination of the evidence, found that the damage to the Gosse Millard shipment was due to wetting received from rain during the stay of the ship at Liverpool, and that that wetting was not consistent with the performance by the defendants of the obligation imposed on the carrier in Art. III., r. 2, of the Schedule to the Act of 1924. Alternatively, he found that the cause of the damage had not been explained. In the action brought by the American Can Company, Ld., he found that the cause of the damage had not been explained.

Jowitt K.C. and *G. St. C. Pilcher* for the plaintiffs.
A. T. Miller K.C. and *Sir Robert Aske* for the defendants.

Cur. adv. vult.

May 23. WRIGHT J. delivered a judgment in which he stated the facts and his findings and continued: The alternative conclusion at which I have arrived as regards the claim of the plaintiffs, Gosse Millard, and the conclusion at which I have arrived as regards the claim of the American

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Can Company—namely, that the precise cause of the damage to the cargo cannot be ascertained—makes it necessary for me to determine as a matter of law on whom lies the onus of proof under the Carriage of Goods by Sea Act, 1924, which applies to the shipment in question. The bills of lading were issued in accordance with that Act, as indeed is made obligatory by s. 3 of the Act, and they contained an express statement that they were to have effect subject to the Rules scheduled to the Act.

These Rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or were liable to the obligations of common carriers, but they were entitled to the utmost freedom to restrict and limit their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the Rules, which cannot be varied in favour of the carrier by any bill of lading, their liabilities are precisely determined, and so also are their rights and immunities. In particular, Art. III., r. 2, of the Rules is in the following terms: "Subject to the provisions of Article IV., the carrier" (which means the carrier and any person employed by him to do the work) "shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." The word "discharge" is used, I think, in place of the word "deliver," because the period of responsibility to which the Act and Rules apply (Art. I. (*e*)) ends when they are discharged from the ship. Art. III., r. 3, requires the bill of lading to state (inter alia) "the apparent order and condition of the goods," that is, on shipment.

The words "properly discharge" in Art. III., r. 2, mean, I think, "deliver from the ship's tackle in the same apparent order and condition as on shipment," unless the carrier can excuse himself under Art. IV. Hence the carrier's failure so to deliver must constitute a prima facie breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of Art. IV., r. 1, which deals with unseaworthiness and provides that, in a case of loss or damage resulting from unseaworthiness, the carrier must prove the exercise of due diligence to make the ship seaworthy. Art. IV., r. 2, contains a long list of matters in respect of loss or damage arising or resulting from which the carrier is not to be liable. The excepted causes specified in paras. (*c*) to (*p*) inclusive, except (*l*), are all matters beyond the control of the carrier or his servants, such as sea perils, acts of God, restraint of princes, riots, inherent vice of the goods, etc. (*l*) relates to deviation to save life and property. (*a*) deals with neglect in the navigation or management of the ship, which falls, I think, under a category different from the care of the cargo. (*b*) relates to fire and, following previous statutory protection, gives a wide exemption. Finally (*q*) is in these terms: "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." I read the second "or" in the above paragraph as meaning "and." In this I agree with the decision of MacKinnon J. in *Brown & Co.* v. *T. & J. Harrison.* (1)

The words of para. (*q*) expressly refer to the carrier as claiming the benefit of the exception, and I think that, by implication, as regards each of the other exceptions, the same onus is on the carrier. He must claim the benefit of the exception, and that is because he has to relieve himself of the prima facie breach of contract in not delivering from the ship the goods in condition as received. I do not think that the terms of Art. III. put the preliminary onus on the owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered, or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while

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(1) (1927) 27 Ll. L. Rep. 415.

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they have been in his custody (which includes the custody of his servants or agents on his behalf) and to bring himself, if there be loss or damage, within the specified immunities. It is, I think, the general rule applicable in English law to the position of bailees that the bailee is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for him to explain or to offer valid excuse if he has not done so. It is for him to prove that reasonable care had been exercised. This was the language of Erle C.J. in delivering the judgment of the Exchequer Chamber in *Scott* v. *London and St. Katherine Docks Co.* (1), adopted by the House of Lords in *Dollar* v. *Greenfield.* (2) In *Joseph Travers & Sons* v. *Cooper* (3) Buckley L.J. said: "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus." Buckley L.J. also quotes from *Morison, Pollexfen & Blair* v. *Walton* (4) the words of Lord Halsbury: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." The principle is also discussed by Atkin L.J. in *The Ruapehu* (5), where he points out that it is wrong to say that the onus on the bailee to prove absence of negligence does not arise until the bailor has first shown some negligence on the part of the bailee. I think that this principle of onus of proof is applicable to the carrier under the Act. Indeed, in the general exception of Art. IV., r. 2 (*q*), it is expressly laid down. In the facts of this case, if the shipowners claim (as they do in their pleading) the benefit of that exception, in that the damage was due to wet or damp, they can only succeed by negativing fault or privity.

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(1) (1865) 3 H. & C. 596.

(2) (1905) The Times, May 19.

(3) [1915] 1 K. B. 73, 88.

(4) Unreported.

(5) (1925) 21 Ll. L. Rep. 310, 315.

Finally, I rely on the language of Lord Sumner, used with reference to the Australian Sea-Carriage of Goods Act, 1904 (now repealed by the Australian Sea-Carriage of Goods Act, 1924), which sums up principles equally relevant to the Carriage of Goods by Sea Act, 1924, which I am considering, apart from the question of seaworthiness, which is somewhat differently dealt with in the earlier Act. The case is that of *Bradley & Sons* v. *Federal Steam Navigation Co., Ld.* (1), where Lord Sumner said: "The bill of lading described the goods as 'shipped in apparent good order and condition' and proceeded 'and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London.' Though the usual words 'in the like good order and condition' do not appear after the word 'delivered,' it was common ground that the ship had to deliver what she received as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

On the above grounds, if the true conclusion be that the cause of the damage to the tinplates has not been ascertained but is left in doubt, I think that the defendants have not discharged the onus which is on them to negative negligence on the part of their servants and to prove some excepted peril, and hence they must be held liable.

Mr. Miller further relied on Art. IV., r. 2 (*a*), and contended that if there was neglect on the part of the defendants' servants, it was "in the management of the ship," so that

(1) (1927) 27 Ll. L. Rep. 395, 396.

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the defendants would be excused. But if the tinplates were damaged through the negligent admission of rain water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship—for instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea connections so as to prejudice the ship's safety while also damaging the cargo. The principle was so stated in *Rowson* v. *Atlantic Transport Co.* (1), where it was somewhat subtly applied to the management of refrigerating machinery, but on the ground that its functions were not limited to cooling cargo. I think that in the present case the protection of the tinplate cargo fell under Art. III., r. 2, and not under Art. IV., r. 2 (*a*). Any other view would in effect nullify the former provision.

The result is that there will be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Botterell & Roche.*

(1) [1903] 2 K. B. 666.

G. F. L. B.

ATTORNEY-GENERAL *v.* BELILIOS AND OTHERS.

1927

June 14, 15, 17.

Revenue—Estate Duty—Succession Duty—Property situate out of United Kingdom—Foreign Disposition—Will to take Effect according to Foreign Law—Testator and Beneficiaries domiciled Abroad—Appointment of Trustees resident in England—Proceedings in English Courts—Establishment of Trust in England—Succession Duty Act, 1853 (16 *&* 17 *Vict.* *c.* 51), *s.* 2—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 2—*Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 58, *sub-s.* 4—*Finance Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 36), *s.* 24.

By his will, which was made in English form and was dated October 1, 1883, a testator, who declared that the instrument was to take effect (so far as the case admitted) according to the law of Hong Kong where he was domiciled, devised and bequeathed his property, which was situate out of the United Kingdom, to trustees on trust to invest a sum to produce a certain annuity for his wife, to pay certain legacies and to stand possessed of the residue to pay the annual income thereof to his sons or son during their or his lives or life and on the death of the last survivor of his sons in trust for his son's children.

The testator died on November 11, 1905, domiciled in Hong Kong, where his will was proved by the tenant for life, who was the only son of the testator living at his death and alone of the trustees acted in the trusts.

In 1911 the tenant for life wished to borrow money and, at the request of the lenders, he appointed, in this country, four new trustees of the will, three of whom were resident in England. Between 1913 and 1922, owing to the tenant for life's dealings with the trust funds, proceedings in the Chancery Division were instituted and Orders were made in connection with the administration of the trusts of the will. On October 17, 1922, the tenant for life died, leaving him surviving his widow and two infant sons, who were domiciled in Hong Kong but had been made wards of Court by virtue of the proceedings in the Chancery Division and the Orders made therein. The trust property, so far as was material, was situate abroad:—

Held, that s. 2 of the Succession Duty Act, 1853, applies to a disposition of property under a trust established in this country as the result of a foreign disposition in the administration of which trust the English Courts may have to apply foreign law, and that, as the trust in the present case was established in England, estate duty was payable by s. 2, sub-s. 2, of the Finance Act, 1894, on the residuary estate, except such part of it as was necessary to provide for the payment of the annuity to the testator's widow.

Dictum of Lord Cranworth L.C. in *Wallace* v. *Attorney-General* (1865) L. R. 1 Ch. 1 explained.

In re Cigala's Settlement Trusts (1878) 7 Ch. D. 351 and *Thompson* v. *Birch* [1876] W. N. 177, 278; Hanson's Death Duties, 7th ed., p. 393, applied.

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Held, further, that succession duty was not payable, since s. 24 of the Finance Act, 1925 (which provides that, for the purposes of succession duty, the succession shall be deemed to arise on the happening of the death by reason of which the successor becomes entitled), is not retrospective.

INFORMATION by Attorney-General tried by Rowlatt J.

By his will dated October 1, 1883, the testator, Emanuel Raphael Belilios, revoked all wills and testamentary dispositions theretofore made by him and declared that to be his last will and testament which (except so far as was thereinafter mentioned) was to take effect (so far as the case admitted) according to the law of the colony of Hong Kong where he was and intended to remain domiciled. After divers specific and pecuniary bequests and after revoking the trusts of two settlements dated June 14, 1872, and March 4, 1878, to the extent therein mentioned the testator reappointed the settled property therein comprised to trustees on certain trusts during the lives of the testator's children and the life of the last survivor of them and on the death of the last survivor on trust for sale and investment of the proceeds of sale in the names or under the legal control of his trustees in certain specified securities with power to vary. The testator devised all the messuages, lands, tenements, hereditaments and real estate of every tenure, including chattels real, of or to which he should at his death be seised, possessed, or entitled, or over which he should at his death have a general power of appointment or disposition by will (except what he otherwise disposed of by his will or any codicil thereto) to trustees on trust, with power to postpone, that they should sell the same. The testator further bequeathed all the money, securities for money, goods, chattels, credits and personal estate of or to which he should die possessed or entitled or over which he should at his death have a general power of appointment or disposition by will (except chattels real and except what else he otherwise disposed of by his will or any codicil thereto) to his trustees on trust, with power to postpone, that they should call in, sell and convert into money such parts thereof as should not consist of money and out of the moneys to arise from the sale of the real estate thereinbefore devised and from the calling in, sale and conversion into money of such parts of the personal estate as should not consist of money and out of his ready money pay his debts, funeral and testamentary expenses and legacies, and out of the residue invest sums to produce an annuityof $12,000 to his wife, Sema Belilios, and annuities to his mother and his brothers and sisters. The testator then proceeded to make provision for payment of certain sums out of the proceeds of sale and conversion of his real and personal estate to each of his sons living at his death or born in due time afterwards who should attain the age of twenty-one years or marry under that age, and to each of his daughters living at his death or born in due time afterwards who should attain the age of twenty-one years or marry under that age with consent. Subject as aforesaid the testator declared that his trustees should stand possessed of the residue of the moneys arising from the sale of the real estate thereinbefore devised in trust for sale and from the calling in, sale and conversion into money of such parts of his personal estate thereinbefore bequeathed as should not consist of money and of the ready money of or to which he should die possessed or entitled on trust to invest the same in the names or under the legal control of his trustees in or upon any of the authorized stocks, funds, shares or securities and to pay the annual income thereof to all or any the sons or son of the testator during their or his lives or life who should have attained or should attain the age of twenty-one years, and if more than one in equal shares, and the testator declared that on the death of the last survivor of his sons his trustees should stand possessed of his residuary trust funds in trust for all or any the children or child living at the death of the testator or born afterwards of his sons and who, being sons or a son, should have attained or should attain the age of twenty-one years, or, being daughters or a daughter, should have attained or should attain that age, or should have married, or should marry under that age with consent. The will contained power for the trustees after the death of the survivor of the testator's sons to raise and apply any part or parts not exceeding in the whole one half part of the then expectant presumptive or vested share in the residuary trust funds of any child of any of the testator's sons under the trusts thereinbefore declared for his or her advancement or benefit and to apply the whole or such part as they should think fit of the annual income of the share or fortune to which any child of any of the testator's sons should for the time being be entitled in expectancy under the trusts thereinbefore declared for or towards his or her maintenance or education.

The testator declared that if, after the death of the survivor of his sons, no child or children of all or any of the testator's sons should live to attain a vested interest, or vested interests, in the testator's residuary trust funds then his trustees should stand possessed of the testator's residuary trust funds and the income thereof on the trusts and with and under and subject to the powers, provisions and declarations thereinafter declared (being certain trusts for the purchase of freehold ground and premises within a radius of three miles from Government House, Calcutta, to form and found thereon such a free college for the education of the children, both male and female, of the Jewish community of Calcutta as in the will more particularly defined), after which event the will was to take effect according to the law of the Empire of India so far as the case admitted.

By his will and by a codicil dated April 20, 1892, the testator appointed certain persons, and also his son, Raphael Emanuel Belilios, on his attaining the age of twenty-five years, as the trustees, executrix and executors of his will. The testator died domiciled in the colony of Hong Kong on November 11, 1905, where his will and codicils were, on May 15, 1906, duly proved by Raphael Emanuel Belilios alone, he being the only son of the testator living at his death, power being reserved to the testator's widow to prove, the other persons named as executors having renounced probate. The grant of probate was duly sealed in this country on November 5, 1906. Of the persons named in the will and codicil as trustees Raphael Emanuel Belilios alone acted in the trusts.

The testator died possessed in this country of certain leasehold premises and furniture and a balance at his bankers the value whereof was exceeded by the amount of the debts due from the testator to persons resident in England, so that no estate duty became payable in respect of such property in this country. The testator also died possessed of immovable property in Hong Kong and net personalty then valued at $2,424,688 of Hong Kong currency (exceeding 250,000*l.*) on which probate duty amounting to $72,741 (7634*l.*) was paid in that colony.

Before 1911 Raphael Emanuel Belilios got into financial difficulties and wanted to borrow money on the security of his interest under the will. The proposed lenders stipulated that English trustees should be appointed. As a result, by a deed of appointment dated May 4, 1911, and made between Raphael Emanuel Belilios, therein described as of Deane Lodge, Ash Green, in the county of Surrey, barrister-at-law, of the one part; the defendant, Vera Carlotta Belilios, of Deane Lodge, aforesaid, the wife of Raphael Emanuel Belilios; the defendant, Richard Owen Roberts, of No. 1 The Cloisters, Temple, in the City of London, barrister-at-law; Ernest Samuel Halford, of 93 Chancery Lane, in the City of London, gentleman; and the defendant, Edward Elvy Robb, of Temple Chambers, in the City of London, solicitor (thereinafter called the "new trustees"), Raphael Emanuel Belilios, in exercise of the power for that purpose vested in him by virtue of the will and of the Ordnance or other law of Hong Kong in that behalf and of every or any other power enabling him in that behalf, appointed himself and the defendants to be trustees in the place of the testator's renouncing trustees and to act jointly with him as the trustees within the meaning of the will and codicils. Raphael Emanuel Belilios also declared that all and singular the hereditaments, chattels and property, whether real or personal, wheresoever situate, including things in action and the right to receive and recover the same, which were then subject to the trusts of the will and codicils and were capable of being vested by that declaration under the local law affecting the same, should vest in himself and the new trustees for all the estate and interest therein subject to the trusts of the will and codicils. The indenture was in fact executed in this country by all the parties thereto, all of whom, except Raphael Emanuel Belilios, and his wife, the defendant, Vera Carlotta Belilios, were permanently resident here. Raphael Emanuel Belilios resided in England for some periods down to the date of his death during a visit to this country on October 17, 1922, but neither he nor his wife ever acquired an English domicil. There was issue of the marriage of Raphael Emanuel Belilios and the defendant, Vera Carlotta Belilios, two children and no more—namely, Lionel Emanuel Raphael Belilios, who was born on October 31, 1905, and Nigel Edward Richard David Belilios, who was born on April 6, 1909, who had always lived in this country since their birth.

On April 7, 1913, October 11, 1915, June 17, 1918, the defendants, in view of dealings with the trust funds by Raphael Emanuel Belilios, began certain actions in the Chancery Division by originating summonses against Raphael Emanuel Belilios, his infant sons and other parties asking for directions in connection with sundry questions which had arisen in the administration of the trusts of the will and codicils of the testator, and the Court made Orders in those actions.

On December 17, 1920, Ernest Samuel Halford retired from the trusteeship.

On October 17, 1922, Raphael Emanuel Belilios died leaving him surviving his widow, the defendant, Vera Carlotta Belilios, and his two infant children, who, the Attorney-General claimed (but the defendants denied), had been made wards of Court by virtue of the proceedings in the Chancery Division and the Orders made therein. After the death of Raphael Emanuel Belilios the Court made Orders in the last of the actions in relation to the education and temporary removal of the infants outside the jurisdiction and authorizing the expenditure as an advancement of 39,809*l*. 10*s*. 10*d*. on a residence for them in Sussex, on which 43,199*l*. 8*s*. 8*d*. was in fact raised and applied.

At the date of the death of Raphael Emanuel Belilios the residuary estate of the testator consisted of (*a*) a sum of 1300*l.* or thereabouts in a bank in the United Kingdom; (*b*) 15,555 fully paid shares of $15 each in the Hong Kong Canton and Macao Steamship Company, Ld., 534 shares of $10 each in the Hong Kong Dairy Farms and Ice Storage Company, Ld., which were then registered abroad in the names of the trustees of the testator's will, but were subsequently sold by the defendants and realized 66,246*l.* 15*s.* 7*d.* net, and ten shares in the Bank of China and Japan, Ld., in liquidation, and (*c*) certain unsold immovable property situate in the colony of Hong Kong which was subject to the trust for sale in the will contained.

The Attorney-General claimed that: (1.) At the date of the death of Raphael Emanuel Belilios the will of the testator was for the purposes of the Succession Duty Act, 1853, an English settlement in that the trust funds and property, although for the most part situate abroad, were vested in trustees who were all resident within the United Kingdom and subject to the jurisdiction of the High Court of Justice whose wards the infants had become by virtue of the Orders referred to; (2.) Upon the death of Raphael Emanuel Belilios the whole of the residuary estate, except so much thereof as was required to provide for payment of the annuity of $12,000 bequeathed to the testator's widow, passed within the meaning of the Finance Act, 1894, and the infants became beneficially entitled thereto in equal shares contingently on attaining their respective ages of twenty-one years, and such beneficial interests constituted a succession within the meaning of s. 2 of the Succession Duty Act, 1853, on which succession duty became payable at the rate of 1 per cent. by virtue of that Act and of s. 58, sub-s. 2, of the Finance (1909-10) Act, 1910, and s. 24 of the Finance Act, 1925; (3.) The defendants as such trustees were accountable for such succession duty in respect of the sums of 39,809*l.* 10*s.* 10*d.* or 43,199*l.* 8*s.* 8*d.*, or other the sum or sums from time to time paid or applied by them to or for the maintenance, advancement or benefit of the infants; (4.) Estate duty at the appropriate rate in respect of so much of the residuary estate as so passed became payable by virtue of s. 2, sub-s. 2, of the Finance Act, 1894, and the defendants were accountable for such duty.

The Attorney-General on behalf of His Majesty accordingly prayed: (1.) That it might be declared that, on the death of Raphael Emanuel Belilios, succession duty at the rate of 1 per cent. became payable in respect of the successions of the infants respectively to the whole of the residuary estate, wherever situate, except such part thereof as was required to provide for payment of the annuity of $12,000 to the testator's widow, Sema Belilios, and that the defendants, as trustees, were accountable for such duty in respect of the sum of 43,199*l.* 8*s.* 8*d.*, or other the sum or sums from time to time paid or applied by them to or for the maintenance, advancement or benefit of the infants respectively; (2.) That it might be declared that on the death of Raphael Emanuel Belilios estate duty became payable at the appropriate rate under the provisions of the Finance Act, 1894, on the whole of the residuary estate of the testator, wherever situate, except such part thereof as was required to provide for the payment of the annuity of $12,000 to the testator's widow, Sema Belilios.

By their answer, the defendants contended that they were not liable to pay the succession duty or the estate duty claimed on the grounds: (1.) That no duty was payable on the death of Raphael Emanuel Belilios in respect of any part of the residuary estate; (2.) that the testator's will at no time constituted an English settlement, but was in form and in substance a settlement subject only to the law of Hong Kong, and that no person entitled thereunder to any benefit might or would become so entitled by virtue of English law; (3.) that none of the property in respect of which the claim of the Commissioners was made passed on the death of Raphael Emanuel Belilios, nor by virtue of the Finance Act, 1894, or any other Act, was to be deemed to have so passed, or to be included in any such Act.

Sir Douglas Hogg A.-G. and *Beebee* for the informant. Under s. 1 of the Finance Act, 1894, estate duty is payable in respect of all property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of that Act. But under s. 2, sub-s. 2, property passing on the death of the deceased which is situate out of the United Kingdom is only included if, under the law in force before the passing of that Act, legacy or succession duty is payable in respect thereof. The property upon which estate duty is claimed in this case is situate in Hong Kong, and therefore it is necessary to see whether succession duty was payable in respect thereof under the law in force before 1894. It is provided by s. 2 of the Succession Duty Act, 1853, that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after" 1853, "either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after" 1853 "to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession,'" and by s. 10 it is provided that succession duty at varying rates shall be levied in respect of every succession. In *In re Smith's Trusts* (1) a testator domiciled in Mauritius left in 1845 stock in the funds to his widow with remainders over, and all the parties in 1852 joined in a deed appointing new trustees in place of the executors, the trusts of the deed being the same as those of the will. The widow died in 1863 and the fund was paid into Court, and Stuart V.-C. held that succession duty was payable. In *Wallace* v. *Attorney-General* (2) Lord Cranworth L.C. held that succession duty was not payable on legacies given by the will of a person domiciled in a foreign country. The ground of his decision was that the words of s. 2 of the Succession Duty Act, 1853 under which a duty was imposed upon every person who becomes entitled to property on the death of another, were so general that of necessity they must receive some limitation in their application, and the true limitation had been held to be one confining the operation of the words to persons who became entitled by virtue of the laws of this country. In *In re Badart's Trusts* (1) a testator who was domiciled in Belgium, but for the last ten years of his life resided and carried on business in England, by his will made in English form directed a sum of 12,000*l.* to be invested in Consols, and held in trust for A. for life with remainder to his nephews and nieces, most of whom were Belgians, and Malins V.-C. held, following *In re Smith's Trusts* (2) and distinguishing *Wallace* v. *Attorney-General* (3), that upon the death of A. succession duty was payable upon the 12,000*l.* by the nephews and nieces notwithstanding the testator's foreign domicil, because he had created an English trust, which must be construed according to English law. The House of Lords in *Attorney-General* v. *Campbell* (4) held that, where property is bequeathed by a person not domiciled in this country, it is not, in the first instance, liable to legacy or succession duty on being paid to the legatee, but that where an executor is directed to collect foreign property and invest it here, and has placed the fund in the way required, any subsequent devolution of it becomes liable to duty, though the party on whom it may devolve may be domiciled abroad. Lord Westbury in that case (5) distinguished *Wallace* v. *Attorney-General* (3) on the ground that in that case it was sought to make, under the will of a man dying domiciled abroad, the first legatee, though he was not liable to legacy duty, become liable to succession duty under the Act. Lord Westbury went on to say: "You cannot apply an English Act of Parliament to foreign property whilst it remains foreign property; but after the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property, and is no longer to be dealt with as if it was merely a portion of a foreign testator's estate to be received in the course of administration." In *In re Cigala's Settlement Trusts* (1) the facts were that on the marriage of an Englishwoman with a domiciled Italian certain securities were transferred by her to four trustees on the ordinary trusts of an English marriage settlement. Eventually the trust funds stood in the names of four English trustees. On the death of the survivor of the husband and wife the two children of the marriage, who were domiciled Italians, became entitled under the settlement. Sir G. Jessel M.R. held that settlement duty was payable, as the settlement was a British settlement, the trustees being subject to British jurisdiction, and the forum for deciding upon any claim in respect of the trust funds being a British Court. The test he laid down (2) was whether the property was "in the hands of English trustees, and you cannot get it from them except by an action in England." If so it was an English settlement and settlement duty was payable. In *Attorney-General* v. *Jewish Colonization Association* (3) a person domiciled abroad gave, by a deed in the English language and form, to an English company certain stocks, shares and securities to a large amount on the terms that he (the donor) was to receive the income thereof during his life, and after his death the company were to apply the same for the benefit of Russian Jews. At the death of the donor the principal part of the securities subject to the deed were foreign securities situate abroad and it was held that on the death of the donor there was a succession to the company within the meaning of s. 2 of the Act of 1853 and that, therefore, succession duty was payable. Stirling L.J. said (4) that "Lord Cranworth's rule"—in *Wallace* v. *Attorney-General* (5)—"if it is to be treated as now binding, must be taken to be satisfied, where property is found to be legally vested in a person subject to the jurisdiction of English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England, even although the operation of the instrument creating that title may to some extent be governed by foreign law." That judgment is conclusive in the present case in favour of the Crown. It is true that the testator here was domiciled abroad, that the beneficiaries, although resident here, are also domiciled abroad, and that the property at the death of the testator was largely invested in foreign securities; but all the trustees are resident in England and all except one are domiciled in England, the settlement is in English form and one concerning which the English Courts have exercised jurisdiction and made Orders, and the English Courts are the only Courts to which the beneficiaries, who have been made wards of Court, can go for protection. It is true that the settlement must be construed according to the law of Hong Kong, because the settlor was domiciled there, but it must also be construed according to English law, because it is in English form. In *Attorney-General* v. *Campbell* (1) the testator expressly directed that the residue of his property should be invested in England, but the principle of the decision applies equally to cases where the trustees have power to invest it here or abroad at their discretion, or where the property itself is already actually invested in this country. *Thompson* v. *Birch* (2) shows that it is sufficient if the fund is under the jurisdiction of the English Courts, as in the present case, no matter by what means it has become so.

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(1) (1864) 12 W. R. 933.

(2) L. R. 1 Ch. 1.

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(1) (1870) L. R. 10 Eq. 288.

(2) (1864) 12 W. R. 933.

(3) L. R. 1 Ch. 1.

(4) (1872) L. R. 5 H. L. 524.

(5) Ibid. 530.

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(1) 7 Ch. D. 351.
(2) 7 Ch. D. 354.
(3) [1901] 1 K. B. 123.
(4) Ibid. 142.
(5) L. R. 1 Ch. 1.

Secondly: The Finance (1909–10) Act, 1910, by s. 58, sub-s. 1, increased the rates of succession duty, and enacted by sub-s. 4 that "this section shall take effect . . . . in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date." The House of Lords held in *Lord Advocate* v. *Macalister* (3) that the "first succession" arose on the death

(1) L. R. 5 H. L. 524, 528.

(2) [1876] W. N. 177, 278; see Hanson's Death Duties, 7th ed., 393.

(3) [1924] A. C. 586.

of the testator. To overcome that decision Parliament enacted by s. 24 of the Finance Act, 1925 (15 & 16 Geo. 5, c. 36), that "for the purposes . . . . of s. 58 of the Finance (1909–10) Act, 1910, a succession shall be deemed to arise on the happening of the death by reason of which the successor, or any person in his right or on his behalf, becomes entitled in possession to the succession or to the receipt of the income or profits thereof." That section is retrospective in effect and applies to a case like the present, where the deaths of the testator and of the tenant for life happened before the passing of the Act. The Legislature in passing that section altered the meaning of the word "arise" as laid down by the House of Lords in *Lord Advocate* v. *Macalister* (1) and in effect reaffirmed *Attorney-General* v. *Anderton* (2), which had been overruled by the House of Lords. Sect. 24 of the Act of 1925 is declaratory of the existing law and is not merely an amending section. If an Act is declaratory of the existing law it has a retrospective effect: *Attorney-General* v. *Theobald* (3); *Attorney-General* v. *Marquis of Hertford*. (4)

Maugham K.C., *Latter K.C.* and *J. D. Israel* for the defendants. Some limitation must be put on the very general wording of s. 2 of the Act of 1853, and it is submitted that the proper limitation is that expressed by Lord Cranworth in *Wallace* v. *Attorney-General* (5)—namely, that the successor must become entitled "by virtue of the laws of this country." The question whether the section applies depends on whether, at the date when the succession opens, the successor became entitled to the property which then passed by the law of the United Kingdom or by foreign law. When Raphael Emanuel Belilios died and the succession opened the property which passed was in Hong Kong, the domicil of the testator was in Hong Kong, and the will was to take effect according to the law of Hong Kong. Clearly, therefore, the infant children who then became contingently entitled to a beneficial interest in the property became so entitled by virtue of the law of Hong Kong and by none other. The original disposition admittedly did not give rise on the testator's death to a succession within s. 2 of the Act of 1853. It is admitted that there may be a succession within s. 2 on the death of a person who himself has become entitled under the original disposition, but the decision in *In re Smith's Trusts* (1) depended on the facts of that case. Nothing which happened after the date of the opening of the succession can affect the position. The Orders made by the English Courts cannot affect the true construction of s. 2. They must be regarded as accidental and purely matters of expediency to enable funds to be procured for the tenant for life at a time when the war rendered recourse to the Courts of Hong Kong inconvenient. The English Courts of equity have always operated in personam and not in rem, and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were neither locally nor ratione domicilii within their jurisdiction: see *Ewing* v. *Orr Ewing*. (2) The fact that the English Court of Chancery had jurisdiction to give directions with regard to the administration of the trust in the present case—the trustees being resident in this country—does not, therefore, compel the conclusion that the succession was by English law and not by foreign law and that, under the will, the proper forum for the administration of the trust was that of Hong Kong.

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(1) [1924] A. C. 586.
(2) [1921] 1 K. B. 159.
(3) (1890) 24 Q. B. D. 557.
(4) (1849) 3 Ex. 670.
(5) L. R. 1 Ch. 1, 7.

It is said that the dictum of Lord Cranworth in *Wallace* v. *Attorney-General* (3) has been criticized in later authorities. In *Attorney-General* v. *Campbell* (4)—in which, it must be noted, there was no argument on behalf of the respondent and the judgment was not a considered one—the disposition may have been one under which the beneficiaries became entitled by English law, because the testator deliberately directed that the residue of his property should be invested

(1) 12 W. R. 933.

(2) (1883) 9 App. Cas. 34.

(3) L. R. 1 Ch. 1, 7.

(4) L. R. 5 H. L. 524.

in England. In any case, there was no qualification of Lord Cranworth's dictum in *Wallace* v. *Attorney-General*. (1) In *Attorney-General* v. *Jewish Colonization Association* (2) the beneficiaries clearly became entitled by virtue of English law, and again there is no criticism of Lord Cranworth's proposition in its ordinary meaning. On the other hand, Lord Cranworth's words have been accepted recently by the Privy Council in *Harding* v. *Commissioners of Stamps for Queensland* (3) and in *Toronto General Trusts Corporation* v. *The King*. (4)

On the second point, s. 24 of the Finance Act, 1925, is not retrospective. [He was stopped on this point.]

Beebee, in reply, referred to *Attorney-General* v. *Johnson*. (5)

Cur. adv. vult.

June 17. ROWLATT J. read the following judgment: The first question in this case—namely, whether estate duty is payable in respect of this property—depends on whether succession duty would have been payable under s. 2 of the Succession Duty Act, 1853.

The facts are that under the will of a testator domiciled in Hong Kong which was made in English form (which may, for all I know, be Hong Kong form also) property was left (and so far as it was real property with a trust for conversion) upon trust for the testator's son for life with, in the events that happened, remainder to that son's two sons. The tenant for life died in 1922, domiciled in Hong Kong, which was also the domicil of his sons. At the date of his death the trustees were resident in this country, but the property, so far as is material to this case, was abroad. The circumstances in which the trust fund came to be and remained vested in English trustees I will deal with later.

The limitation which, it was common ground, has to be read into s. 2 of the Succession Duty Act, 1853, for the purpose of its application to foreign dispositions has never been stated

(1) L. R. 1 Ch. 1, 7.
(2) [1901] 1 K. B. 123.
(3) [1898] A. C. 769, 773.
(4) [1919] A. C. 679, 685.
(5) [1907] 2 K. B. 885, 893.

Rowlatt J.

in words capable of being read textually into the section, unless it was by Lord Cranworth in *Wallace* v. *Attorney-General* (1), where he said that the successor must become entitled by virtue of the laws of this country. Mr. Maugham contended that that remained the true test. Having regard, however, to *Attorney-General* v. *Campbell* (2) and to *Attorney-General* v. *Jewish Colonization Association* (3), Lord Cranworth's words must be taken in a sense wide enough to include the case of a trust established in this country, as the result of a foreign disposition, in the administration of which trust the Courts here might have to apply foreign law. Further, in view of *In re Cigala's Settlement Trusts* (4), it seems to me that the circumstance that the investments representing the trust fund are abroad cannot be decisive, although it may have to be taken into consideration in determining whether the trust has or has not been established in this country.

What I have to ascertain is, therefore, whether the disposition conferring the succession is being carried out by a trust established here fulfilling the requirements of the principle laid down in *Attorney-General* v. *Campbell.* (2) In that case the trust was established in this country pursuant to directions in the disposition itself. Here it was not. Possibly a good deal might be said in favour of a contention that this circumstance of itself differentiates the present case from *Attorney-General* v. *Campbell* (2) and that the removal to this country of the trust of a foreign disposition not in pursuance of the terms of the disposition but at the choice of the parties does not bring the successions conferred within the scope of the Act. But I do not think that that point is open before me, because in *Thompson* v. *Birch* (5), Bacon V.-C. clearly ruled that the principle of *Attorney-General* v. *Campbell* (2) applied to a fund established in this Court—that was the fact in that case—" no matter by what means." The testator there had not directed that the fund was to be transferred to this country, and it was with reference to that circumstance that the Vice-Chancellor uses the words "no matter by what means."

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(1) L. R. 1 Ch. 1, 7.

(2) L. R. 5 H. L. 524.

(3) [1901] 1 K. B. 123.

(4) 7 Ch. D. 351.

(5) [1876] W. N. 177, 278; Hanson's Death Duties, 7th ed., p. 393.

The question, therefore, is reduced to this: Was the trust at the death of the tenant for life in fact established in this country? Mr. Maugham pointed out that, whenever a trustee can be found in England, the trust, wherever its origin or subject-matter, can be enforced against him and he urged that the mere presence in this country of the trustee of a foreign disposition cannot alone attach duty to the successions which it may have conferred. I feel the force of that argument, but I have not that simple case to deal with. Here the history was shortly as follows. The tenant for life got into financial difficulties and wanted to borrow money. The proposed lenders insisted on English trustees, and gentlemen of position and of permanent British residence were appointed. Then it was discovered that the tenant for life, who had been sole trustee, had drawn wrongfully upon capital, and a particularly close and strict supervision of the affairs of the trust became necessary on the part of the trustees. Several applications were made to the Court, and the sons, who were infants, became wards of Court. In former days, no doubt, the trust would have fallen to be fully administered by the Court. The tenant for life strongly objected to this English régime, but the strength of his resistance, which was in vain, only emphasizes the English character which this trust had assumed. I think that it was as much established here as if the fund had been brought into Court, as in *Thompson* v. *Birch*. (1)

For these reasons, and applying the law as laid down in that case, I hold that, on this part of the case, there must be judgment for the Crown.

The second question in the case on which the claim to succession duty itself depends is whether s. 24 of the Finance Act, 1925, is retrospective. That section enacts that a succession shall be deemed to arise on the death. The act of interpretation referred to in the word "deemed" must of course be in the future, but the moment when interpretation

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(1) [1876] W. N. 177, 278; Hanson's Death Duties, 7th ed., p. 393.

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is called for is the moment of the death. The section, therefore, refers to the interpretation to be applied upon future deaths. If it had been intended to enact that from the passing of the Act the effect of past events should be reversed it was easy (and there are well known forms of words for the purpose) to declare that the law should be deemed to have always been as then provided.

In the result, there must be judgment for the Crown upon the first point—the claim for estate duty—with the general costs of the information, and judgment for the defendants upon the claim for succession duty, with the costs of the issue as regards that.

Judgment accordingly.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Elvy Robb & Co.*

G. F. L. B.

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May 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31;
June 1, 2, 14, 15, 16, 24.

W. ANGLISS AND COMPANY (AUSTRALIA) PROPRIETARY, LIMITED *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

[1926. W. 1858.]

Shipping—Bill of Lading—Delivery of Cargo in damaged Condition—Holds unfit and unsafe—Defect in Design—Bad Work by Builders' Servants—Liability of Shipowner—Australian Sea-Carriage of Goods Act, 1924 (*No.* 22 *of* 1924), *Schedule, Art. III.* (1.); *Art. IV.* (1.)—*Carriage of Goods by Sea Act,* 1924 (14 & 15 *Geo.* 5, *c.* 22), *Schedule, Art. III.* (1.); *Art. IV.* (1.).

By Art. III., r. 1, of the Schedule to the Australian Sea-Carriage of Goods Act, 1924 (which is in the same terms as the Carriage of Goods by Sea Act, 1924, Schedule, Art. III., r. 1): "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(*a*) Make the ship seaworthy: (*b*) Properly man, equip, and supply the ship: (*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

By Art. IV., r. 1, of the Schedule to the Australian Act (in the same terms as Art. IV., r. 1, of the English Act): "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to" [comply with the requirements of Art. III., r. 1 (*a*), (*b*) and (*c*)].

The obligation under these Rules of a carrier under a bill of lading to exercise due diligence to make the ship seaworthy and fit for the carriage of goods is not limited to his personal diligence; his responsibility extends to the acts or default of his agents or servants. Where, however, the carrier has contracted for the building of the ship he is not liable for lack of due diligence on the part of the shipbuilders or their workmen, unless he fails to engage builders of repute and to adopt all reasonable precautions, for example, requiring the builders to satisfy one of the recognized classification societies and engaging skilled naval architects, who advise him, and skilled inspectors, who supervise the work, with due diligence.

Semble, if he buys a ship he must take all appropriate steps to satisfy himself by surveys and inspections that she is fit for the service in which he puts her. The need to repair a ship may cast on the carrier a special duty to see, so far as is reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects.

Action in the Commercial List tried by Wright J.

On bills of lading dated October 1 and 10, 1925, the plaintiffs shipped on board the defendants' steamship *Cathay* some 10,000 carcases of lamb in apparent good order and condition for safe carriage from Melbourne and Sydney to London, and delivery at London to the plaintiffs' order in London subject to contract. By a paramount clause in the bills of lading the terms of the Australian Sea-Carriage of Goods Act, 1924, were incorporated in the contract. On arrival at London it was found that 5711 of the carcases were damaged by oil taint.

The plaintiffs accordingly brought this action, claiming damages for alleged breach of contract and/or breach of duty by the defendants in and about the carriage of the meat. The plaintiffs alleged that the damage was caused by the failure of the defendants to exercise due diligence to provide a seaworthy vessel with holds fit and safe for the carriage of goods in accordance with Art. III., r. 1, of the Australian Sea-Carriage of Goods Act, 1924, in that the bulkhead between No. 3 hold, in which the carcases were carried, and the fuel oil bunker were leaking at many points. In particular, they said that there was no cofferdam between boundary bar had

inadequate planning

the bulkhead and No. 3 hold; and that the deckbar was too small and its riveting should have been double and not single, which were defects in design. They also said that there was bad workmanship in the fitting and riveting of the bar. caulking & countersinking did not ensure oil-tight integrity

The defendants pleaded that if the ship was unseaworthy or unfit for carriage of goods, as the plaintiffs alleged, the defendants were not liable for any damage suffered by reason thereof, because "before and at the beginning of the voyage" they had exercised the due diligence required by Art. III., r. 1. In particular, they had employed competent qualified naval architects and surveyors, who had surveyed the ship and exercised due care in her building, to see that she was seaworthy and fit, and before the carcases were loaded, through their servants and competent surveyors, they had surveyed her and found her apparently seaworthy and her holds apparently fit for the reception, carriage and preservation of the goods. They pleaded that if the plaintiffs had suffered any loss or damage arising or resulting from unseaworthiness it was not owing to any want of due diligence on their part, and they relied on Art. IV., r. 1, of the Act.

At the trial the plaintiffs based their case primarily on the bad workmanship which they alleged with regard to the fitting and riveting of the bar.

The judge found on the evidence that: (1.) the design of the bar and of its fitting was inadequate and defective, and there should have been a cofferdam, but these defects of design involved no failure of due diligence on the part of any person concerned, having regard to the fact that carriage of oil fuel in such circumstances had not then been the subject of sufficient experience and having regard to the existing current standard of knowledge in such matters; (2.) there was some bad workmanship both in riveting and in fitting the bar to the bulkhead which was entirely the fault of the individual workmen employed by the builders and could not have been detected by any reasonable care on the part of the defendants' inspector, or by Lloyd's inspector, or the Board of Trade inspector, or by

[illegible]

the builders' foremen; (3.) the damage to the plaintiffs' cargo was due to the defects of design, although it may have been contributed to by the bad workmanship.

Miller K.C. and *David Davies* for the plaintiffs.

Sir John Simon K.C., *Bevan K.C.* and *Stranger* for the defendants.

June 24. Wright J. in a considered judgment reviewed the evidence in detail, stated his findings of fact and continued: I have to consider the law in relation to these findings. The bill of lading recites receipt of the goods in apparent good order and condition, the goods to be delivered in London subject to the contract. The contract for material purposes is to be found in the provisions of the Australian Sea-Carriage of Goods Act, 1924, which is embodied by the clause paramount in the bill of lading. That Act is identical with the English Act in that it, like the English Act, embodies the Schedule containing the Rules relating to bills of lading. Sect. 5 of the Australian Act, which is in practically identical terms with s. 2 of the English Act, provides as follows: "There shall not be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship." Art. II. of the Schedule is in the following terms: "Subject to the provisions of Art. VI., under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." Art. III., r. 1, is in these terms: "The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(*a*) Make the ship seaworthy: (*b*) Properly man, equip, and supply the ship: (*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation." It is sub-s. (*c*) which is material in this case.

Then Art. IV., r. 1, is as follows: "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of para. 1 of Art. III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section." "Carrier" is defined in Art. I. (*a*) as including "the owner or the charterer who enters into a contract of carriage" (sc. by bill of lading) "with a shipper."

The obligation of the carrier to exercise due diligence to make the ship fit is clearly not limited to his personal diligence. The carrier may be a company and, in any case, in the complication of modern affairs and by reason of the widely scattered situation of seaports, he must act by agents or servants, which is the phrase employed in Art. IV. (2.) (*q*). The question is: How wide is the category of agents or servants with reference to the obligation now being considered. It is contended by the plaintiffs that, as the primary obligation on the carrier is to provide a seaworthy ship, the carrier cannot delegate any part of that obligation so as to relieve him of his personal liability, and he must accordingly be accountable for lack of due diligence on the part of the shipbuilders and their workmen, who are to be deemed to be his agents, to make the ship seaworthy and fit, and that, therefore, the defendants must be held liable for the bad workmanship of which I have found the shipbuilder's men guilty and which I have not excluded as a contributing cause of the actual damage. I do not think that this contention is sound.

The Carriage of Goods by Sea Acts have introduced a new and obligatory code of responsibilities and immunities as affecting carriers under bills of lading in place of the former rule that carriers by sea, while generally under the liability of common carriers, were free by contract to vary and limit their liabilities. In particular, the Acts have expressly abolished the previous absolute obligation to provide a seaworthy ship and have substituted an obligation to use due diligence to that effect. The carrier may not be the owner of the ship, but merely the charterer; he may not have contracted for the building of the ship, but merely have purchased her, possibly years after she has been built. In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier and it is illogical that there should be such difference in the carrier's obligations merely because he has bought the ship by the method of contracting with the builders to build it for him. In addition, if the carrier were held liable for the bad workmanship of the builders' men, he might equally be held liable for bad workmanship by the men employed by the various sub-contractors who supply material for the builders, such as steel-workers in furnaces and rolling mills, or who supply special articles such as castings, pumps or proprietary machines, which would involve an almost unlimited retrogression.

Under the old rule the only relevant question was whether the ship was seaworthy or unseaworthy. That rule was no doubt well adapted to more simple days when ships were not very complicated wooden structures of a few hundred tons, but in modern times, when ships are complicated steel structures full of complex machinery, the old unqualified rule imposed too serious an obligation on carriers by sea, and I think that the new Acts have intended to emphasize the specialization which has developed in modern times and to emphasize the distinction between carrier and shipbuilder and limit the carrier's obligation to due diligence in his capacity as carrier. He is to be liable for all such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment. If he has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions.

He may be held bound to require, for instance, the builders to satisfy one of the well known classification societies, such as Lloyd's, or to engage skilled naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her. But I do not think in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which, though concealed, renders the vessel unfit.

In the present case the defendants employed an inspector to supervise the work. I have held that that inspector used due diligence. It may well be that, if he had negligently passed bad work which he saw, or even, perhaps, which he ought to have seen, the carrier would be liable for want of due diligence on the part of one to whom he had delegated the task of inspecting the work, although such supervision, it may be, cannot be other than general or go to every detail of the workmanship. Similarly, the carrier might perhaps be held liable if the naval architect whom he employed to supervise the design, applying current standards, failed to detect a definite error in design, although I do not think that he would be so liable for an error on the part of one of the classification societies, such as Lloyd's, which occupy a public and quasi-judicial position. He might also be liable if, either personally or by his scientific advisers, he chose a special form of construction which involved, according to current standards, a known risk—for example, if he chose to dispense with a cofferdam so as to increase his cargo space although the best opinion thought a cofferdam necessary. Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects.

It was argued on behalf of the defendants that the obligation only attached in respect of matters at the port of loading,

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the words being "before and at the commencement of the voyage" and the obligation being only in favour of the particular shipper and dating at earliest from the time of the material contract of carriage between that shipper and the carrier. In a sense I think that this is true, but, if the vessel were in fact unfit owing to some earlier breach of due diligence in that regard by the carrier, his agents, or servants, I think that the carrier would be liable on the ground of actual or imputed knowledge of the defects or failure to use due diligence continuing to the date relevant to the particular contract. In matters appertaining to the actual conduct of the voyage a somewhat different principle may apply regarding the carrier's liability for acts of servants of sub-contractors—for example, for the negligence of stevedores' men; but to load and discharge is part of the definite acts undertaken by the carrier in his capacity of carrier and he is necessarily liable for the due performance of such acts by the persons, whoever they are, who do them on his behalf.

I have thought it better to deal with the question involved in the construction of the Act itself, because it is a new departure on new principles and its Rules have been applied by other countries not necessarily conversant with the English case law. Nor have counsel professed to refer me to any authorities likely to afford me much assistance. I have been referred to two cases under the Harter Act in which the meaning of due diligence to make the ship seaworthy has been discussed, but under that Act the absolute obligation to provide a seaworthy ship is left unabrogated. In *The R. P. Fitzgerald* (1) a shipowner was held liable in respect of an obvious defect in a vessel. In *The Abbazia* (2) a shipowner was debarred from relying on surveyors' certificates given in circumstances known to the master and engineer to be inconsistent with proper inspection. These cases seem rather to accord with what I have said above. In the English case of *G. E. Dobell & Co.* v. *Steamship Rossmore Co.* (3) a shipowner was held

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(1) (1914) 212 Fed. Rep. 678.

(2) (1904) 127 Fed. Rep. 495.

(3) [1895] 2 Q. B. 408.

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responsible for the failure of the ship's carpenter to close a porthole the closing of which was necessary to the seaworthiness of the ship. This was clearly a failure of due diligence on the part of the carrier's servant. In *London Rangoon Trading Co.* v. *Ellerman Lines* (1) Sankey J. held under a charterparty that there had been a failure of due diligence on the part of the shipowners' own servant in not observing an obvious defect, but he indicated that the ship repairers might be regarded as the shipowner's agent to do the repairs. But it appears from *Ellerman Lines* v. *Smith's Dock Co.* (2) that the ship repairers had limited instructions and were not instructed to repair the particular defect.

I did not gather that reliance was placed on the exception of "latent defects not discoverable by due diligence," which is contained in Art. IV. (2.) (*p*) of the Schedule. Assuming that that refers to defects in the ship, it seems to me to involve the same question of the range of persons whose due diligence was involved, and would also raise the difficult question of the exact meaning of "latent," as to which I may refer to a case in the Court of Appeal: *The Dimitrios N. Rallias.* (3) My conclusion would be the same.

The result is that there will be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Parker, Garrett & Co.*
Solicitors for defendants: *Freshfields, Leese & Munns.*

(1) (1923) 14 Ll. L. Rep. 497.
(2) (1924) 18 Ll. L. Rep. 172.
(3) (1922) 13 Ll. L. Rep. 363.

G. F. L. B.

MIDLAND BANK LIMITED *v.* INLAND REVENUE COMMISSIONERS.

1927
July 21, 25.

Revenue—Stamp—Bill of Exchange—Money payable by Bank on Presentation of "receipt"—"Document . . . . entitling . . . . any person . . . . to payment by any other person"—Stamp Act, 1891 (54 *&* 55 *Vict.* c. 39), *s.* 32.

The appellant bank issued documents to its customers in the form of receipts for the payment by them to the customer of sums under 2*l*., and agreed with its customers that they would pay to persons presenting these documents to them signed by a customer the sums named therein and would debit the customer's account therewith, it being their avowed intention that the documents should be used for the same purpose as cheques, and the object being to avoid the stamp duty on cheques:—

Held, that the documents were bills of exchange within the meaning of s. 32 of the Stamp Act, 1891, as "entitling . . . . any person . . . . to payment by any other person of . . . . any sum of money," and were therefore liable to the duty.

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

On June 28, 1927, and July 4, 1927, respectively, two instruments, copies of which are hereinafter set out, were presented on behalf of the Midland Bank Ld. (hereinafter called "the appellants") to the Commissioners of Inland Revenue (hereinafter called "the Commissioners") under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty, if any, with which the said instruments were respectively chargeable. The following is a copy of one of the two instruments, which is hereinafter referred to as "instrument number 1":—

" This receipt must only be used for amounts under 2*l*.

Paid
24th June 1927.

" 0975 A
24th June 1927.

" Received of

" MIDLAND BANK LIMITED,
Threadneedle Street, E.C. 2.
" the sum of ten shillings
" at the debit of my account.
" 10. 0.
" T G. E. BALDRY."

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The following is a copy of the other instrument, hereinafter referred to as "instrument number 2":—

"This receipt must only be used for amounts under 2*l*.

A

"0976

30th June, 1927.

"Received of

Paid 2nd July 1927

"MIDLAND BANK LIMITED

"Threadneedle Street, E.C. 2.

"the sum of ten shillings at the debit of my account.

"10. 0

D/A

Coutts & Co. Strand 11.

"T

G. E. BALDRY."

Both instruments were unstamped. The signature in each case had been cancelled on payment by the bank cashier in the usual manner.

The circumstances in which the said instruments came into being are as follows: During the month of May, 1927, the appellants caused to be circulated for use in the public newspaper press a statement in the following form:—

"MIDLAND BANK 'RECEIPTS.'

An important step has been taken by the Midland Bank in pursuance of its policy of encouraging the formation of banking habits among people of small means, who for one reason or another are not always prepared to avail themselves of the facilities offered by our great financial institutions. Some are deterred by the smallness of their resources, though this is largely an imaginary difficulty in these days, when the humblest customer is given every possible consideration and access to the full range of banking services. But one of the principal objections which many people raise to the opening or more frequent use of a banking account is the requirement of a stamp on every cheque drawn. It is often felt that the charge of 2*d*. imposed by the revenue on even

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the smallest cheque payment is prohibitive, with the result that many settlements are effected in cash despite the additional risk and trouble involved.

The new means of payment now being introduced by the Midland Bank overcomes this objection, and in consequence should provide an added encouragement to the opening of a bank account. In future, customers of the bank may obtain free of charge from any branch a 'book of receipts' containing a number of forms which, being available only for the payment of sums under 2*l.* do not require to be stamped. The receipt form, somewhat similar in appearance to a cheque, bears upon its face the wording 'Received of the Midland Bank Limited............................Branch, the sum of...........' and provides space for the date, the amount in words and in figures, and the customer's signature. When the receipt has been filled in, it may be presented for payment in cash at the branch on which it is drawn, or handed to a tradesman or other creditor in settlement of a debt. In this and several other respects it possesses the advantages of the cheque.

It will be seen at once what a material saving is secured by the use of the receipt in settlement of small accounts, while the fact that the scheme has been submitted to the Board of Inland Revenue, who raise no objection whatever (1), makes it probable that the new medium of payment will attain wide popularity among all classes of the community. In these days, quite clearly, it becomes more and more advantageous to open a banking account, however small one's resources, and in its calculated study of the convenience of the small depositor the Midland Bank is to be congratulated on its originality and enterprise.

The new system is to be put into operation forthwith, and books of receipts are now available to old or new customers at any of the 1940 branches of the bank in England and Wales."

The effect of this statement was widely reproduced in the public press. Mr. G. E. Baldry, who signed both of the instruments to which this case relates, was a customer of the appellants, and had, at all material times, a current account in credit at the Threadneedle Street branch. Mr. Baldry signed and delivered to the appellants a request in the following terms, on a form of request supplied by the appellants for the purpose :—

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(1) It was admitted that this statement was made under a misapprehension.

"Midland Bank Limited.

"Threadneedle Street Branch.

"I request you to allow me to withdraw from time to time from my account with you sums under 2*l*. each against delivery to you of receipts addressed to you and duly signed by me and I authorize you to pay the amount of such receipts to the bearer thereof and to debit the same to my account.

"Dated this 24th day of June, 1927.

"(Signature) G. E. BALDRY."

Thereupon the appellants delivered to Mr. Baldry a book of detachable forms to be used by Mr. Baldry if he so desired. A specimen book of similar forms was annexed to the case to be referred to as part thereof. The instruments presented for adjudication were in that form. Each one of the said forms was so marked, printed, lettered and numbered as to be separately identifiable by the appellants.

On June 24, 1927, the sum of 10*s*. was paid by a Mr. James to, and received by Mr. Baldry. A liability was thereby created on the part of Mr. Baldry for payment of a like sum to Mr. James. Mr. Baldry thereupon signed one of the forms detached from his book of receipts, being instrument number 1, and handed it to Mr. James, and it was the expectation of both parties that the instrument should be used by Mr. James for obtaining from the appellants payment of a sum of 10*s*. to be debited to Mr. Baldry's account in discharge of such liability by production and delivery of the instrument to the appellants by Mr. James either personally or through his own bankers, and the instrument was, in fact, so used by Mr. James. Mr. James was a customer of the Threadneedle Street branch of the appellants and delivered the instrument to the cashier at that branch over the counter. The document was accepted, and

Mr. Baldry's account with the appellants was debited with the sum of 10*s*. and Mr. James' account with the appellants was credited with the like sum. The indorsement "Paid 24th June, 1927," appearing by means of a rubber stamp on instrument number 1, was made by the appellants.

On June 30, 1927, in like circumstances, the sum of 10*s*. became due to Mr. W. H. Beaumont from Mr. Baldry. Mr. Baldry thereupon signed one of the forms detached from his book of receipts, being instrument number 2, and handed it to Mr. Beaumont. Mr. Beaumont was a customer of Messrs. Coutts & Co., bankers, of 440 Strand, and delivered the instrument to Messrs. Coutts & Co.'s cashier with instructions to obtain payment of the sum of 10*s*. from the appellants. Messrs. Coutts & Co.'s representative attended at the Threadneedle Street branch of the appellants on July 2 and requested payment of the sum of 10*s*. in exchange for instrument number 2. The sum of 10*s*. was paid to Messrs. Coutts & Co.'s representative, who handed over to the appellants instrument number 2, and the account of Mr. G. E. Baldry at the Threadneedle Street branch of the appellants was debited with the amount. The indorsement, "Paid 2nd July, 1927," appearing by means of a rubber stamp on instrument number 2, was made by the appellants. The indorsement "Coutts & Co. Strand 11" appearing on instrument number 2 by means of a rubber stamp was made by Messrs. Coutts & Co.

The Commissioners expressed their opinion that each of the instruments presented for adjudication was a bill of exchange within the true intent and meaning of the Stamp Act, 1891, and being payable on demand or at sight or on presentation was chargeable with the duty of 2*d*. under that Act, and s. 36 of the Finance Act, 1918 (8 & 9 Geo. 5, c. 15). The appellants declared themselves dissatisfied with the determination of the Commissioners on the ground that neither of the instruments was a bill of exchange within the meaning and effect of the Stamp Act, 1891. They therefore, in pursuance of s. 13 of the said Act of 1891, required the Commissioners to state and sign this case.

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The question for the opinion of the Court as respects each of the said instruments presented for adjudication was whether it was chargeable with the duty of 2*d.* applicable to a bill of exchange payable on demand, or, if not, whether it was liable to any duty, or whether it was exempt from duty.

Rayner Goddard K.C. and *Andrewes-Uthwatt* for the appellants. These documents are not liable to stamp duty under the Stamp Act, 1891, and, being receipts for less than 2*l.*, do not require receipt stamps.

[ROWLATT J. The bank, being debtor to its customer for the amount of his account, might, if they liked, pay him without being asked to do so by a cheque, and might demand a receipt.]

Yes. There are only three ways in which these receipts can be used: (1.) by the customer himself over the counter; (2.) by the customer's agent; and (3.) by a third person to whom the customer has handed it. It is only if they are not what they purport to be—namely, receipts—that they are liable to stamp duty, and it is impossible to have a document which must be stamped in one set of circumstances and not in another. The Stamp Act, 1891, aims, not at the transaction but at the instrument whereby it is carried out, and if the transaction can be carried out in a way which does not necessitate a stamp it may be so carried out: *Inland Revenue Commissioners* v. *Angus & Co.* (1) If the tax was payable on these documents in some circumstances and not in others that would mean that the transaction and not the document was being taxed, and moreover it would involve an inquiry by the taxing authorities as to the circumstances attending its existence with reference to every document.

[ROWLATT J. referred to *Brown, Shipley & Co.* v. *Inland Revenue Commissioners.* (2)]

If not taxable on their face these documents are not taxable. Comparison of the language of s. 17 of the Revenue Act, 1883 (46 & 47 Vict. c. 55), dealing with documents "intended to enable any person . . . . to obtain payment from such banker," with that of s. 32 of the Act of 1891, shows that the latter is much less comprehensive. If the Legislature in 1891 had intended to include every document entitling a person to payment by a banker they could easily have done so in the language they had employed in 1883, of which they must be assumed to have been aware. The Crown will have to contend that the words of the later section are as wide as those of the earlier one. These documents do not purport to do anything; they are not ambiguous. They do not entitle the holder to payment, nor to payment from the person from whom they are received; at most they are evidence of a debt. If not paid by the bank no one could sue upon them; he would have to sue upon the original consideration. They are not like bills of exchange which can be sued on because they entitle to payment. They are not negotiable instruments, i.e., they do not confer a better title than that of the transferor. The bank here merely agreed with their customers, of which agreement the holders of the documents get the advantage, to pay persons bringing these documents to them, the bearers being their customers' agents to receive the money, and the bank pays, not because of the document, but because it is the creditor of the customer. No one can spell out of them an order to pay. The bank need not insist on a cheque, though in practice it usually does so, and it has not yet been judicially decided whether a bank is entitled to refuse payment when not demanded by cheque.

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(1) (1889) 23 Q. B. D. 579, 589.

(2) [1895] 2 Q. B. 598.

Rothschild & Sons v. *Inland Revenue Commissioners* (1) is not an authority against the appellants, because the holder there could have sued on the coupons. Again the document in *Committee of London Clearing Bankers* v. *Inland Revenue Commissioners* (2) entitled to a transfer.

Sir D. Hogg A.-G. and *J. H. Stamp* for the Crown. It is agreed that it is the document and not the transaction that is taxed, and also that it is permissible to carry out a transaction in such a way as to escape tax if it can be done. But it is not true to say that the Commissioners cannot go behind the document to find out its true nature, for when it has

(1) [1894] 2 Q. B. 142.

(2) [1896] 1 Q. B. 542.

to be decided whether an instrument is liable to tax, its true substance and commercial character must be ascertained, and the Commissioners are not bound by the outward appearance of the document: *Great Western Ry. Co.* v. *Inland Revenue Commissioners* (1) and *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners.* (2)

[*Committee of London Clearing Bankers* v. *Inland Revenue Commissioners* (3) and *Buck* v. *Robson* (4) were also referred to.]

The wording of the exemption 2 to "Bill of Exchange," in Sch. I. to the Act of 1891, "Draft or order . . . . used solely, etc.," involves the necessity of an inquiry as to the user of the document. Sect. 17 of the Revenue Act, 1883, was enacted to extend the crossed cheques sections of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 76–82, and has no bearing on the present question, because it dealt with a different subject-matter.

To be taxable a document need not be one upon which one has a right to bring an action. When a customer agrees with his bank that on the presentation to them of a document they will pay money out of the sum standing to the customer's credit to the person presenting the document, that document must be stamped as a bill of exchange, whether it purport on the face of it to have that effect or not, or even, to take an extreme case, if it purport to have the opposite effect, and reads: "Please do not pay." Although in form receipts these documents were never used as receipts, for at the time of their coming into existence as they stand the bank had paid nothing, nor were they presented as an acknowledgment that the bank had paid. Presentation of the documents entitled to payment, which could not be obtained in any other way. The bank could be sued for not paying on them, for a refusal to pay would be a breach of their agreement with their customers. The right to sue on a bill of exchange does not arise from its wording but from custom, which custom has become law, and in time these documents might also, by custom, be placed on the same footing.

(1) [1894] 1 Q. B. 507, 513.

(2) (1887) 20 Q. B. D. 645, 651 and (on appeal) (1888) 21 Q. B. D. 352, 355.

(3) [1896] 1 Q. B. 542.

(4) (1878) 3 Q. B. D. 686.

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In *Rothschild & Sons* v. *Inland Revenue Commissioners* (1) the document was not an order, for it was agreed that "pay" therein meant "payable," yet it was held to be a bill of exchange, because the intention and effect of it was that the person holding it should be paid.

Rayner Goddard K.C. in reply. With regard to exemption 2 to "Bill of Exchange," in Sch. I., it is one thing to look into a document to see if it is exempt, and another to look into it to see if it is taxable.

Cur. adv. vult.

July 25. ROWLATT J. read the following judgment: In this case the facts and documents make it abundantly clear that these so-called receipts were designed to serve the purpose of cheques, in that they were intended (to use the most neutral term that occurs to me) to put the money at the disposal of the persons to whom they were handed. They are not, however, cheques, and if it had been attempted to tax them as such because the transaction might have been effected by cheques, that attempt would have been defeated on the well known principle exactly exemplified in *Inland Revenue Commissioners* v. *Angus & Co.* (2) That is the point of that case. Here the tax is claimed not as if the documents had been cheques or anything else which they are not, but because (so it is said) they are in themselves documents entitling a person to a payment by another person, which is a substantive subject of tax under s. 32 and Sch. I. to the Stamp Act, 1891. I say "in themselves," because that raises a question which must be faced. If there is another advantage which accrues to the holder of a document by virtue of another arrangement dehors the document the effect of that arrangement cannot be imputed to that document (if I may use that expression) so as to attract to it any duty to which a document embodying such an arrangement would be liable. That is what is made clear by the other case that was referred to—namely, *Brown,*

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(1) [1894] 2 Q. B. 142.

(2) 23 Q. B. D. 579.

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Shipley & Co. v. *Inland Revenue Commissioners.* (1) Mr. Goddard says that this is such a case, and if it is he is right. He contends that what the recipient of this document gets is the benefit of a promise to him by the person who signs it that the bank will pay the money. But the Crown are not asking for duty as upon such a promise, and Mr. Goddard does not say they are. What he is really saying is a totally different thing—namely, that in considering what the document itself does, one has to look at the mere words in the document in the abstract apart from the function of the document as intended and understood by the parties who employ it. That proposition, as it seems to me, receives no support from *Brown, Shipley & Co.* v. *Inland Revenue Commissioners* (1), and is negatived by the decision in *Rothschild & Sons* v. *Inland Revenue Commissioners* (2), where Mathew J. treats himself as entitled to have "regard" —I quote his own words—"to what the document is and how it is used." What, therefore, is this document, and how is it used? It is referred to as a receipt. But it is not a receipt unless and until it is used as such by being given as an acknowledgment of payment. When the person signing it gives it to his creditor he is not giving a receipt, and if it were for an amount of 2*l.* or upwards he would not incur a penalty under s. 103, sub-s. 1, of the Stamp Act, 1891, for giving a receipt not duly stamped. What, then, is it when it is used as it was here? The words of it, upon which Mr. Goddard says we are to concentrate, describe nothing occurring between the signatory and the recipient, and unless we are permitted to inquire what is the meaning of its existence in the hands of the bearer we must say that as a document at this stage it has effected nothing at all; it has not indeed come into operation. If, as I think, this inquiry cannot be excluded, we find that it has effected something, that it has come into operation as a delivered document, and that (subject to one question as to the meaning of the word "entitled") its function has been to entitle the recipient to payment of the sum mentioned in it. The question reserved above is this. Mr. Goddard correctly pointed out that the holder of this document cannot sue the bank nor, upon the document itself, the signatory. I think, however, that the case of *Committee of London Clearing Bankers* v. *Inland Revenue Commissioners* (1) shows clearly that no such right of action is necessary to bring a document within the phrase under discussion.

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(1) [1895] 2 Q. B. 598.

(2) [1894] 2 Q. B. 142, 146, 147.

For these reasons I think my decision must be in favour of the Commissioners, with costs.

Appeal dismissed.

Solicitors for appellants: *Clarke, Rawlins & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

THE KING v. ESSEX JUSTICES (SIZER AND OTHERS).

Ex parte PERKINS.

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April 6, 7.

Justices—Possibility of Bias—Justices' Clerk formerly Solicitor for Party in Dispute arising out of same Subject-matter.

A solicitor was clerk to justices and left his business at a branch office almost entirely to his own clerk there. A lady consulted the solicitor's clerk at that office about the preparation of a deed of separation from her husband, and the clerk to the knowledge of her husband acted for her in the matter for a time, after which she ceased to consult him. No mention of the matter was made to the solicitor himself except one very short reference to it in a weekly report from his clerk. Subsequently, at the hearing by the said justices of a summons for maintenance by the lady against her husband, the solicitor acted as their clerk and the husband appeared in person, and eventually the justices made an order in favour of the lady. The husband obtained a rule nisi for a certiorari to remove the order of the justices. He stated in an affidavit that he was embarrassed before the justices by the feeling that their clerk was adverse to him, and that he was not aware at the time that he could make objection to his so acting. The solicitor stated in an affidavit that when acting as clerk to the justices on the occasion in question he had no knowledge that his firm had acted for the wife, and that he was in no way adverse to the husband:—

Held, that the rule should be made absolute, inasmuch as (1.) the applicant had a right to take objection to the presence of the solicitor as clerk to the justices, which would create in his mind the reasonable impression that justice was not being done.

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(1) [1896] 1 Q. B. 542.

Rex v. *Sussex Justices. Ex parte McCarthy* [1924] 1 K. B. 256, observations of Lord Hewart C.J. applied.

(2.) The applicant had not waived his right to take the objection by not having exercised it, since he did not know that he was entitled to it.

Vyvyan v. *Vyvyan* (1861) 30 Beav. 65, observations of Romilly M.R. applied.

Rule Nisi for a writ of certiorari.

Mr. C. Gordon Jones, the surviving member of the firm of Jones & Son, solicitors, of Colchester, was clerk to the justices of the Tendring Division of Essex, and registrar of the Haverhill County Court of Suffolk, and had his head office at Colchester and branch offices at Clacton-on-Sea and Haverhill. His office at Clacton was kept mainly for the business of the clerkship to the said justices, but also for his private business as a solicitor, and it was in charge of his clerk, Mr. F. P. Dighton. He himself seldom attended personally at the office at Clacton except on the justices' court days there, but his said clerk, who had nothing to do with the magisterial work, carried through the solicitor's business at that office, and made weekly reports of that business to the Colchester office.

On June 7, 1926, the wife of Mr. W. J. A. Perkins, the applicant for the above mentioned writ of certiorari, called at the said Clacton office, where she saw Mr. Dighton, to whom she stated that she wanted to have a separation agreement between herself and her husband prepared. At her request Mr. Dighton wrote to her husband and correspondence passed between them in regard to the matter. From time to time thereafter Mr. Dighton saw the said lady and discussed with her the replies her husband had sent to the said office and to herself and advised her in respect of them. On August 18, 1926, Mr. Dighton saw a Mr. D. Field, a solicitor of Clacton, and mentioned the lady's business to him, pointing out that it had apparently reached a stage at which he (Mr. Dighton) could be of little further assistance to her, and on August 30, 1926, Mr. Dighton, at the suggestion of Mr. Field, sent the whole of the said correspondence to the latter, who shortly afterwards became the lady's solicitor.

On September 15, 1926, the applicant was served with a summons for maintenance at the instance of his wife, and an entry thereof was made in the agenda paper for the court to be held by the said justices at Clacton on September 27, 1926.

On the last mentioned date the summons was heard by the justices, when Mr. Jones acted as their clerk, Mr. Field appearing for the applicant's wife and the applicant appearing in person. Both sides were heard at length, the parties being respectively examined and cross-examined, and thereupon the applicant asked the court to adjourn the case. The justices retired to consider their decision, and when they returned into court the chairman announced that they had decided that the case should be adjourned for two months, and that the applicant should meanwhile pay to the officer on behalf of his wife and four children the weekly sum of 30*s*., and the justices made a temporary order to that effect, a copy of which was served upon the applicant.

On November 22, 1926, the date specified in the temporary order, the adjourned hearing of the summons took place, when Mr. Jones again acted as clerk to the justices, Mr. Field again appearing for the applicant's wife, but the applicant not appearing in person or otherwise. The justices then made a permanent separation order that the applicant's wife be no longer bound to cohabit with the applicant, that the custody of the children be committed to her, and that the applicant should pay to his wife through the officer the weekly sum of 30*s*. for the maintenance of her and the said children.

On December 10, 1926, the applicant, by his counsel, applied for and obtained a rule nisi calling upon the justices to show cause why a writ of certiorari should not issue to them to remove into the High Court the said order made by them on November 22, 1926, on the ground that the justices' clerk, having acted as solicitor for one of the parties until immediately before the hearing, took part in the hearing; upon notice thereof to be given to the applicant's wife.

The application was supported by an affidavit of the applicant made on December 7, 1926, in which he stated in effect: (1.) that after he and his wife had resided at various specified addresses, his wife in September, 1925, removed to a house which he took for her at Clacton, and that, though he had very little money, he visited his wife and family there from time to time and sent her all the money he could; (2.) that the said Mr. Jones, a solicitor, practised as Jones & Son at Clacton, and was clerk to the said justices, and that about June, 1926, his wife consulted the said firm about a deed of separation and many letters passed between himself and the said firm in regard to the matter; (3.) that on September 15, 1926, he was served with the said maintenance summons, that on September 27, 1926, he attended before the justices in person, and that the said Mr. Field appeared for his wife and commenced by stating that, as the justices were aware, the case had been in the hands of other solicitors; (4.) that during the hearing the said Mr. Jones acted as clerk to the justices, and in that capacity practically conducted the proceedings, taking part in the examination of the applicant's wife and eliciting from her that she was not willing to live with the applicant, that he (applicant) was much confused and embarrassed in his cross-examination of his wife by Mr. Jones saying that he was not to make speeches but only to ask questions, and that when on the question of his earnings the applicant produced a letter and handed it to Mr. Jones, he retained it in his own custody and subsequently handed it to Mr. Field, asking him if he wanted to make a note of it; (5.) that at the close of the applicant's case Mr. Jones told him (applicant) that he could state his case and need not go into the witness box, but that he gave evidence and explained the difference in his circumstances, that in cross-examination by Mr. Field, on being asked about certain accommodation which he said he had secured for his family in London, some of the grounds put forward in the letters from Mr. Jones's firm were put to him, including the hardship of his daughter sacrificing a scholarship which she had obtained by having to return to London, and that in order to satisfy the court that he had secured rooms for his family he handed to Mr. Jones a letter to a firm of house agents and a receipt from them for a deposit, who thereupon handed them to Mr. Field to take a note of; (6.) that he (applicant) asked the court to adjourn the case for three months to give him time to secure other accommodation for his family, that the justices retired, Mr. Jones going with them, and when they returned the chairman stated that they had decided to adjourn the case for two months, the applicant to pay 30*s*. a week through the court officer; (7.) that he understood that the adjournment was for two calendar months, and that he overlooked the fact that the temporary order stated that the facts alleged in the complaint had been proved; (8.) that in consequence of the misunderstanding he was not in court on November 22, 1926, on which occasion he believed from the newspaper reports that Mr. Jones was again in attendance as clerk to the justices. Para. (10.) of the affidavit was as follows: "During the proceedings at which I attended I felt embarrassed in my conduct of the case by reason of the feeling that although Mr. C. Gordon Jones had formally divested himself of his capacity of solicitor for my wife and was now a part of the tribunal whose duty it was to adjudge the matter in question or was their legal adviser, he was adverse to me. I was not aware at the time that I could make objection to his conducting the proceedings or advising the magistrates or retiring with them. . . . ."

In opposition to the rule nisi an affidavit was made by the said justices on February 22, 1927, an affidavit was made by the said Mr. F. P. Dighton on February 24, 1927, and an affidavit was made by Mr. C. Gordon Jones on March 16, 1927.

Mr. Jones in his affidavit, after mentioning the facts above stated regarding his business and the official positions held by him, said (2.) that his clerk, the said Mr. Dighton, included in his weekly report on June 12, 1926, the following reference: "New matters . . . . 57. Mrs. Perkins—separation agreement.

I am afraid the costs will be very small . . . . ," that in none of the subsequent weekly or other reports of Mr. Dighton was there any reference to any Mrs. Perkins or a separation agreement for her, and that, if he had thought of it at all, as he did not, he should have assumed that the matter had been completed or become abortive, and he never until after the order nisi was granted made any inquiry as to her or her business; (3.) that until he saw in a local newspaper a report of the granting of the rule nisi he was absolutely unaware of and had no knowledge or information that any correspondence with the applicant or interviews with his wife had taken place, that on or about September 25, 1926, he saw the agenda paper for the court to be held by the said justices on September 27, 1926, but the name of the applicant's wife and the nature of her business had then quite passed from his memory, and when he saw the said paper he did not in any way connect the name of the complainant therein with the Mrs. Perkins who had been referred to in the said weekly report, and he was unaware of the existence of the applicant or his wife; (4.) that at both the courts held on September 27 and November 22, 1926, respectively, so far as he was aware, Mr. Field had been and was instructed to act for the applicant's wife by herself in the ordinary way without any introduction by the Clacton office or Mr. Dighton; (6.) with reference to para. 3 of the applicant's affidavit, that he (deponent) had no recollection of the statement attributed to Mr. Field as to other solicitors having acted for the applicant's wife, and if that statement was made it left no impression on his mind, and that the whole of the correspondence, he had since ascertained, had been previously handed to Mr. Field, who did not at the court produce or read any of it; (7.) with reference to para. 4 of the said affidavit, that he strenuously denied that he practically or at all conducted the proceedings as alleged, that he took no part in the examination of the applicant's wife other than in the usual way on behalf of the court, that he did not elicit from her the statement that she was not willing to return to the applicant which was made by her in answer to a question by the applicant himself, and that the applicant did not appear to be confused or embarrassed when checked in attempting to make speeches during his cross-examination of his wife; (8.) as to para. 5 of the said affidavit, that the applicant was cross-examined by Mr. Field on statements in the correspondence, but none of the letters was read or put in evidence nor was the name of the deponent's firm mentioned in connection with them; and that the letter to and receipt from the house agents were not admissible in evidence in chief and were passed to Mr. Field to see whether he objected to their being read, and as he did not they were placed before the justices and afterwards handed back to the applicant; (9.) as to para. 6 of the said affidavit, that the applicant himself asked for an adjournment and stated that if the case was adjourned his wife could come back to him in London and that he would send 30*s.* a week for her in the meantime, that the justices then retired, and that at their invitation and as was usual deponent retired with them, that he was invited by them to express his opinion, and he advised that in his view the case was not sufficiently made out to justify them in making a permanent order, which they were prepared to make, and that in view of the applicant's statement and offer they should adjourn the matter, making an interim order to see if he carried out his undertaking, and that they adjourned the matter for two months accordingly; (10.) as to para. 7 of the said affidavit, that the adjournment was for two months, the word calendar not being mentioned, and that about October 4, 1926, the applicant was by a copy of the temporary order informed of the date of the adjournment; (11.) with reference to para. 10 of the said affidavit, the present deponent denied that he was in any way adverse to the applicant, that the applicant appeared to have been aware throughout the proceedings that deponent through his firm had been interested in or concerned for the case of his said wife, but he deliberately forbore to draw the attention of the justices or the deponent to the alleged circumstances at any time before or during the proceedings, and gave no indication that he was in any way embarrassed in his conduct of the case by such feeling as he alleged he had

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or at all, that any knowledge on deponent's part or any protest by the applicant that the deponent or his firm was concerned professionally or as alleged would at once have received the attention of the justices and of deponent, and he would have requested the justices to appoint or allow him to appoint a deputy to act in the proceedings in his place; and (12.) that the order which the applicant sought to have quashed was made by the justices without consulting the deponent.

The justices in their affidavit gave an account of the said proceedings before them which was substantially similar to that given by Mr. Jones in his affidavit, and they further stated in effect (2.) with reference to para. 2 of the applicant's affidavit, that until after a report of the granting of the rule nisi they had no knowledge that any correspondence or communication had taken place between their said clerk or his firm and the applicant, that no objection was taken to the presence of their clerk, that if Mr. Field said that "as they (the magistrates) were aware the case had been in the hands of other solicitors" the statement was incorrect, as they were not so aware, and the statement, if made, conveyed nothing to them; (5.) with reference to para. 6 of the said affidavit, that an interim order for maintenance setting out the date of the adjourned hearing was duly served on the appellant; (6.) with reference to para. 8 of the said affidavit, that on the adjourned day, November 22, the applicant's wife deposed that she had not received any communication or offer of a house from the applicant, and in these circumstances and as the applicant was not present and no communication had been received from him, they (the justices) without retiring or consulting their said clerk made the permanent order for maintenance; and (7.) with reference to para. 10 of the said affidavit, that if the applicant had given the slightest intimation that their (the justices') said clerk or his firm had acted or purported to act as solicitor for the applicant's wife in the said matter of which they were satisfied that their clerk had no notice or knowledge they would at once have arranged for the services of a deputy clerk.

Mr. Dighton in his affidavit deposed to the facts above mentioned regarding the Clacton office and the business transacted therein, the work done by him in connection with the case of the applicant's wife, and the handing over of that case to Mr. Field, and further stated (6.) that he heard no more of that case till September 15, 1926, when he was informed that Mr. Field had telephoned to the Clacton office asking that a form of summons for maintenance might be supplied to the applicant's wife for delivery to him, that the information and form of summons were prepared by the clerk attending to these matters, who had not previously had cognizance of the matter, and without reference to him (deponent), and handed to her for delivery to Mr. Field, that the summons was entered on the agenda paper for the court at Clacton on September 27, 1926, which was a day or two previously thereto forwarded to Mr. Jones at Colchester as clerk to the justices, that in the interval he (deponent) had not seen or communicated with the applicant's wife or Mr. Field, and that he did not attend at the court on September 27 or November 22, 1926; and (7.) that in his reports to the Colchester office the only reference to the applicant's wife or her business was that of which the terms are set out above in para. 2 of Mr. Jones's affidavit, that no inquiry was made by Mr. Jones or his firm until after the rule nisi with regard to the said entry in the said report, and from June 7, 1926, when the applicant's wife first saw him (deponent) until after the rule nisi he (deponent) never save by the said report informed Mr. Jones that he had seen or advised the applicant's wife or any Mrs. Perkins or had any correspondence with the applicant and his wife, and to the best of his knowledge and belief Mr. Jones had not until after the rule nisi either seen or heard of the said correspondence or interviews save by the said report.

S. E. Pocock for the clerk to the justices showed cause. The rule nisi should be discharged. The applicant is not entitled to a writ of certiorari to bring up the order of the justices on the ground that their clerk's firm had acted as solicitors for his wife.

First, the applicant had no right to object to Mr. Jones acting as clerk to the justices. It is admitted that in judicial proceedings justice must not only be done, but must appear to be done: *Rex* v. *Sussex Justices. Ex parte McCarthy.* (1) Here there is no ground for saying that, because, at the hearing of the summons for maintenance taken out against the applicant by his wife, Mr. Jones acted as clerk to the justices, either justice was not done or did not appear to be done. Though the applicant's wife had previously consulted Mr. Jones's clerk at his office about the preparation of a deed of separation, Mr. Jones personally took no part in the matter. The only mention of it that had been made to him was a very short reference to it in a weekly report from his clerk. The name of the applicant's wife and the nature of her business had entirely passed from his memory before the said proceedings before the justices began. His clerk had ceased to act for the applicant's wife and she had gone to another solicitor before the proceedings before the justices began. Mr. Jones, when acting as clerk to the justices at the hearing of the summons, did nothing which prevented or even seemed to prevent justice from being done. He only checked the applicant for the proper purpose of preventing irregularity in procedure. He was not and did not even appear to be adverse to the applicant. On the contrary, at the first hearing he supported the request of the applicant for an adjournment. At the adjourned hearing the applicant was not present owing to a mistake of his own, and as his wife's evidence was then uncontradicted it was not unreasonable that the justices should make an order in her favour. They made that order without consulting Mr. Jones. The applicant did not entirely resist the summons, because at the first hearing he made an offer to pay 30*s.* a week for his wife until he found a residence for her. The justices, like their clerk, were entirely ignorant that his firm had ever acted for the applicant's wife.

Secondly, if the applicant had any right to object to the order of the justices on the ground that Mr. Jones acted as

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(1) [1924] 1 K. B. 256.

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their clerk, he waived that right by taking no objection to the order. Before a person can waive a right it is no doubt necessary that he should know of the existence both of the facts upon which the right is founded and of the right, but here the applicant knew of both these matters. He knew of the fact that Mr. Jones had been in the position of solicitor for his wife, and he cannot be heard to say that he did not know that he had a right in law to object to the employment by the justices of a clerk who might, as he supposed, be biassed against him.

Alexander Cairns for the applicant, in support of the rule nisi. The rule nisi should be made absolute. A writ of certiorari should issue to bring up the order of the justices to be quashed on the ground that their clerk had previously been in the position of solicitor to the applicant's wife.

First, the applicant had a right to object to the clerk to the justices acting as such at the hearing of the summons on which the order was made. It is admitted by the justices and their clerk that in the conduct of judicial proceedings it is essential not only that justice should be done, but that it should seem to be done: *Rex* v. *Sussex Justices. Ex parte McCarthy.* (1) In the present case, even if justice was done, it did not appear to be done. The applicant states that he was embarrassed on seeing the justices' clerk acting as such after he had been in the position of solicitor to the applicant's wife. In considering whether justice appeared to the applicant to be done it is immaterial to inquire whether or not the clerk knew that he had been in the position of solicitor to the applicant's wife, since the fact that the clerk had no knowledge of having been in that position could not affect the view of the applicant that justice was not being done. It is further submitted, however, that justice was not here in fact done, and that the case is not one in which the justices should have made a maintenance order.

Secondly, the applicant has not waived his right to object to the justices' clerk having acted as such during the proceedings in question. In order that a person should waive

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a right it is necessary that he should know not only the facts of which the right is a legal consequence, but also that he possesses the right. Waiver, like election, presupposes that a person is fully cognizant of his rights and neglects to enforce them: per Romilly M.R. in *Vyvyan* v. *Vyvyan* (1); *Davenport* v. *The Queen* (2); and *Beaudry* v. *Montreal Corporation.* (3) The maxim "Ignorantia juris non excusat" does not mean that for all intents and purposes a man must be taken to know the legal consequences of his acts: per Lush J. in *Reg.* v. *Tewkesbury Corporation* (4), cited in Broom's Legal Maxims, 8th ed., p. 210, n. (*p*). While knowledge of the law must, generally speaking, be imputed to every one, it would be too much to impute knowledge of the equitable doctrine of election: per Lord Westbury in *Spread* v. *Morgan* (5), cited in Broom's Legal Maxims (ubi sup.), and similarly it would be too much to impute knowledge of the doctrine of waiver. Here, though the applicant knew that the firm to which the justices' clerk belonged had previously acted for his wife, he did not know that he had therefore a legal right to object to his acting as clerk.

AVORY J. This is a rule nisi obtained at the instance of Mr. W. J. A. Perkins calling upon justices for the county of Essex to show cause why a writ of certiorari should not issue to remove into this Court a maintenance order dated November 22, 1926, in favour of Kathleen M. F. Perkins, the wife of the applicant, on the ground that the justices' clerk, having acted as solicitor for one of the parties until immediately before the hearing, took part in the hearing.

There is no dispute about the material facts. Before the hearing of the summons taken out by the wife of the applicant, upon which the order in question was made, the firm of solicitors, in which the clerk to the justices was a partner, had acted for the wife of the applicant and carried on on her behalf a considerable correspondence with the applicant regarding the very subject-matter which came before the justices—namely, the alleged neglect of the applicant to properly maintain his wife. At the first hearing of the summons the present applicant appeared in person to answer the complaint which had been made against him. The justices' clerk was also then present in his official capacity, and took part as their clerk in dealing with the matters which arose on that summons. Further, we must, I think, accept, and I do accept, the statement of the justices' clerk that at the time of these proceedings he was not in fact aware that his firm had been acting as solicitors for the applicant's wife. According to his affidavit the facts were that the business of his office at Clacton-on-Sea was conducted entirely by a managing clerk who reported to him every week, that with the exception of a short mention in one of the weekly reports of the case of Mrs. Perkins there was no mention in any of these reports of any person of that name, and that he had no personal knowledge of any interviews or correspondence in regard to the matter. I also accept the statement of the justices' clerk that if he ever saw the name of the applicant's wife in the weekly report it had passed from his memory, and that when he saw the agenda paper for the court to be held by the justices he did not in any way associate the name of the complainant therein mentioned with the Mrs. Perkins referred to in the weekly report. All the contentious proceedings before the justices in the matter took place while their clerk was sitting with them. The applicant's wife gave evidence in support of her case against her husband. The applicant cross-examined his wife and gave evidence himself with a view to showing that the justices should make no order against him, though it is to be observed that he did suggest that the matter should be adjourned to give him time to secure accommodation for his family. The clerk then retired with the justices and advised them that at that stage there were no sufficient grounds upon which to make a permanent order against the applicant, and that they should adjourn the matter. The justices accordingly granted an adjournment for two months. On the return day the applicant did not attend by reason of his having made a mistake as to the date, and the justices made the permanent maintenance order now in question.

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(1) 30 Beav. 65.

(2) (1877) 3 App. Cas. 115.

(3) (1858) 11 Moore, P. C. 399.

(4) (1868) L. R. 3 Q. B. 629, 639.

(5) (1865) 11 H. L. C. 588, 602.

In these circumstances it may be true to say, as counsel for the justices' clerk has contended, that no injustice was here done in fact. It appears to me, however, that we must apply the principle which was stated by Lord Hewart C.J. in *Rex* v. *Sussex Justices. Ex parte McCarthy* (1), where he said: "It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that [it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." I think that in that sentence the words "be seen" must be a misprint for the word "seem." "The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done, but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." The only difficulty here arises from the fact that the clerk to the justices has stated on affidavit that at the time when the summons was heard he did not in fact know that his firm had acted for the applicant's wife. If we had to consider whether or not he was in fact biassed, that statement would be most material. We have here to determine, however, whether or not there might appear to be a reasonable likelihood of his being biassed. If there might, then justice would not seem to the applicant to be done, and he would have a right to object to the clerk acting as such. I must conclude that, though the clerk to the justices and the justices did not know that his firm had acted for the applicant's wife, the necessary, or at least the reasonable, impression on the mind of the applicant would be that justice was not being done, seeing that the solicitor for his wife was acting with the justices and advising them on the hearing of the summons which she had taken out against him.

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(1) [1924] 1 K. B. 256, 258.

The other question that has been raised is whether there has been any waiver by the applicant of his right to object to the clerk sitting and acting as clerk at the hearing of the summons. The applicant in para. 10 of his affidavit says: "During the proceedings at which I attended I felt embarrassed in my conduct of the case by reason of the feeling that although Mr. C. Gordon Jones had formally divested himself of his capacity of solicitor for my wife and was now a part of the tribunal whose duty it was to adjudge the matter in question or was their legal advisor, he was adverse to me." He knew the fact, therefore, that the clerk to the justices was a member of the firm which had acted for his wife. He goes on: "I was not aware at the time that I could make an objection to his conducting the proceedings or advising the magistrates or retiring with them." The question is whether in these circumstances the applicant can be said to have waived his right to make the objection. In answering that question we ought, in my view, to act upon the principle laid down by Lord Romilly M.R. in *Vyvyan* v. *Vyvyan* (1) in these words: "Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim." It cannot be said that the applicant was fully cognizant of his right to take objection to the clerk to the justices acting as such, and, that being so, he did not waive that right by failing to exercise it.

In this case, therefore, although no moral blame attaches to the justices or their clerk, we ought, in my opinion, to hold that this rule nisi for a certiorari should be made absolute.

(1) 30 Beav. 65, 74.

Swift J. I am of the same opinion. It is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiassed. As Lord Hewart C.J. said in *Rex* v. *Sussex Justices. Ex parte McCarthy* (1): "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." Might a reasonable man suppose that there had here been such an interference with the course of justice? I agree that he might, and I therefore think that this rule nisi should be made absolute for a certiorari to remove the order of the justices into this Court with a view to its being quashed.

Talbot J. I agree.

[On the application of counsel for the applicant the Court directed that the rule should be made absolute with costs against the clerk to the justices.]

Rule absolute.

Solicitors: *Doyle, Devonshire & Co., for Jones & Son, Colchester; E. E. Kent.*

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(1) [1924] 1 K. B. 256.

J. R.

DALE *v.* MITCALFE.

1927
May 16.

Revenue—Income Tax—Settlement—Income from Fund accumulated for Benefit of Person on Contingency—Beneficiary having Life Interest only—Tax paid during Period of Accumulation—Right to Repayment of Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 25.

In pursuance of the provisions of a settlement the income of the prospective share of a beneficiary was accumulated during her minority and added to the capital thereof, and the beneficiary on coming of age acquired a life interest in that share. During the period of accumulation income tax had been paid each year in respect of the income of the share :—

Held, that the income had been accumulated "for the benefit" of the beneficiary within the meaning of the Income Tax Act, 1918, s. 25, notwithstanding that it had been added to the capital of a fund in which she only acquired a life interest, and, the case being in other respects within the section, that she was, therefore, entitled thereunder to repayment of the amount of the tax so paid.

Case stated by Commissioners for the General Purposes of the Income Tax.

On October 29, 1925, Mary C. L. Mitcalfe (formerly Burn), the wife of W. S. Mitcalfe (hereinafter called "the respondent"), appealed to the Commissioners against an objection made by Mr. A. P. Dale, an inspector of taxes (hereinafter called "the appellant"), to a claim made by the respondent for relief under the Income Tax Act, 1918, s. 25 (1), in respect of income accumulated under the settlement hereinafter mentioned.

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(1) Income Tax Act, 1918, s. 25 : "Where in pursuance of the provisions of any will or settlement any income arising from any fund is accumulated for the benefit of any person contingently on his attaining some specified age or marrying, and the aggregate amount in any year of assessment of that income and the income from any other fund subject to the like trusts for accumulation and of the total income of that person from all sources (hereinafter referred to as 'the aggregate yearly income') is of such an amount only as would entitle an individual either to total exemption from tax or to relief from tax, that person shall, on making a claim for the purpose within three years after the end of the year of assessment in which the contingency happens, be entitled, on proof of the claim in manner prescribed by this Act, to have repaid to him on account of the tax which has been paid in respect of the income during the period of accumulation a sum equal to the aggregate amount of relief to which he would have been entitled if his total income from all sources for each of the several years of the said period had been equal to the aggregate yearly income for that year; but in calculating that sum a deduction shall be made in respect of any relief already received."

The following facts were proved or admitted :—

By a settlement dated October 18, 1910, made between John Henry Burn and the trustees therein named, the said J. H. Burn (hereinafter called "the settlor") settled certain stocks, securities and moneys (hereinafter called "the trust funds") upon trusts in favour of his two sons and three daughters, all of whom were then minors. The settlement contained the following clauses, which set forth the said trusts so far as they are relevant to the questions raised in the case: "5. . . . . Upon trust for all or any the children or child of the settlor . . . . who being male shall attain the age of 21 years or being female shall attain that age or previously marry if more than one in equal shares except that each son shall take double the share of each daughter. 7. Provided further that the said trustees or trustee shall retain the share of each daughter of the settlor now living of and in the trust funds upon the trusts following (that is to say) the said trustees or trustee shall pay the income thereof to such daughter during her life and so that during coverture the same shall be for her separate use without power of anticipation but which restraint shall not preclude the payment of such income to a bank or banker for the credit of such daughter and after the death of such daughter shall stand possessed of her said share upon the like trusts and subject to the like powers and provisions in favour of the issue of such daughter as are hereinbefore declared and contained concerning the share of each of the sons of the settlor now living in the trust funds. . . . . 9. Provided always and it is hereby declared that notwithstanding the trusts hereinbefore declared of the shares of the children of the settlor now living it shall be lawful for each of such children by deed executed in contemplation of his or her marriage or when married by will or codicil to appoint that all or any part of the income of his or her original and accruing share or shares in the trust funds shall from and after his or her death be paid to his or her wife or husband (as the case may be) for her or his life or any less period and upon such conditions and with such restrictions as such child making the appointment shall think fit. 10. Provided always that the said trustees or trustee shall apply the whole or such part as they or he in their or his discretion shall think fit of the income of the expectant or presumptive share whether settled or unsettled of any child or grandchild of the settlor in the trust funds under the trusts hereinbefore contained for or towards his or her maintenance education or benefit (whether there is any other fund applicable or any person bound by law to provide for such maintenance or education or not) and may either themselves so apply the same or may pay the same to the parents or guardians or guardian of such child or grandchild for the purpose aforesaid without seeing to the application thereof and shall during the minority of any such child or grandchild and in the case of a female spinsterhood accumulate the surplus (if any) of the same income by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation and so as to follow the destination of the share from which the same shall have proceeded but with power to apply any such accumulations in any subsequent year for or towards the maintenance education or benefit of the child or grandchild for the time being presumptively entitled as aforesaid in the manner in which such accumulations might have been applied had they been income arising in the then current year. 11. Provided always that the said trustees or trustee shall have power to raise any part or parts not exceeding together one half part or share of the capital of the then expectant presumptive or vested share (whether settled or unsettled) of any child of the settlor or of any grandchild of the settlor under the trusts aforesaid and apply the same in or towards the purchase of any business or partnership or for the purposes of a settlement in consideration of an intended marriage or otherwise for his or her advancement preferment or benefit as the said trustees or trustee shall in their absolute discretion think fit notwithstanding that the child of the settlor for whose benefit the same shall be so applied shall be a life-tenant only but so that no such moneys shall be raised and applied as aforesaid out of the settled share of any child of the settlor without the consent in writing of such child and of his or her wife or husband if entitled to any interest therein by virtue of any such appointment as aforesaid. . . . ."

The respondent was a daughter of the settlor, and attained the age of twenty-one years on May 26, 1921. The respondent was married to her present husband, William Stanley Mitcalfe, on August 31, 1922. Income tax at the rates appropriate to each tax year had been duly paid by deduction or otherwise by the trustees of the settlement in respect of the whole income of the trust funds up to the said May 26, 1921. As from the said May 26, 1921, the income of her share of the trust funds, including the income of her share of the invested accumulations, had been paid to the respondent, and she had been fully repaid all the tax recoverable by her in respect of such income up to the date of her marriage.

A claim under the said section for repayment of the sum of 380*l*. 3*s*. 11*d*. for or on account of tax paid or deducted in respect of income accumulated during her minority under the settlement was made by the respondent on September 12, 1922, to the appellant, and was refused by him. The accumulations of income from the trust funds were, during the minority of the respondent, set aside to the credit of a separate accumulations fund in the names of the trustees of the settlement.

The claim was refused by the appellant on the ground that "as the accumulations of the income are added to the capital of the trust fund which never passes to the beneficiary the claim under s. 25 . . . . cannot be admitted."

It was contended on behalf of the respondent that the surplus income of the trust fund had been accumulated during her minority for her benefit to the extent of the share thereof to the income of which she became entitled on May 26, 1921, inasmuch as on attaining the age of twenty-one years she became entitled to receive the income from these accumulations in addition to her other income; that the words "for the benefit of" in s. 25 must be given their ordinary meaning, there being nothing in the Act to restrict that meaning in the way suggested by the Crown; that the surplus income had been accumulating for the benefit of the respondent within the meaning of s. 25 none the less because she was not under the trusts of the settlement entitled absolutely to those accumulations; and that clause 10 of the settlement empowered the trustees to apply accumulations in any subsequent year for the benefit of the child or grandchild presumptively entitled to a share in the trust funds in the manner in which such accumulations might have been applied had they been income arising in the then current year.

The appellant contended (inter alia) that the respondent was not entitled to the repayment claimed under s. 25, and that the claim had been rightly refused.

The Commissioners held that the respondent was entitled to repayment of the tax, the subject of the claim.

The sole question for the Court was whether the respondent was entitled to the relief allowed by s. 25.

Sir D. M. Hogg A.-G. and *R. P. Hills* for the appellant.

Latter K.C. and *Cyril King* for the respondent.

[Reference was made to *Stoneley* v. *Ambrose* (1) and *In re Adam's Policy Trusts.* (2)]

ROWLATT J. In my judgment the decision of the Commissioners was right. I have to construe these words of s. 25 of the Income Tax Act, 1918, "income . . . . accumulated for the benefit of any person contingently on his attaining some specified age or marrying." Here a settlement provides that the income of certain money was to be accumulated contingently upon a young lady reaching twenty-one or marrying. The accumulations were to be capitalized, if they had not been used, under the powers of the settlement, and with the capital were to form a fund of which she was to have the interest during her life, and from which, if she married, she could appoint a sum to her husband after her death, and so on. She would thus be provided for in the way in which it is customary for people of some means to provide

(1) (1925) 9 Tax Cas. 389; 133 L. T. 233. (2) (1883) 23 Ch. D. 525.

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for their daughters. It is said that the words "income . . . . accumulated for the benefit of any person" mean income accumulated for the person in the sense that it is accumulated to be paid over to the person contingently on his reaching the specified age. I agree with counsel for the Crown to this extent, that if I found words of gift cast in this mould, that is to say, if there were some will or settlement so loosely drawn as to say the income is to be accumulated for the benefit of A. B., contingently on his attaining twenty-one, I certainly should construe that as meaning that it was to be handed over to him on attaining the age of twenty-one. There would be nothing to restrict the estate that was given to him. I think that is perfectly true, but I do not think the converse, if it be the converse, is true also. It seems to me that I must assume that the Legislature have here deliberately used words which are very much wider than they might have used. Instead of saying "accumulated for any person" they have gone out of their way to say "accumulated for the benefit of any person." I think that anybody applying ordinary language to well known social phenomena would say that when a man provides for income to be accumulated in the way in which this settlor has provided he is doing it for the benefit of the daughter. I do not know how the provision could be better put without reciting the whole settlement every time. I therefore do not see my way to cut down these words in the way suggested by the Crown. The only difficulty which occurs to me is one which only obliquely affects the question. This money is claimed back by the young lady herself. If it had not been paid in income tax, or if the income tax had been less, to the extent of the difference, she never would have got it, because it had been accumulated and become capital and invested, until she was twenty-one. Though that consideration raises a difficulty, I do not think that on the strength of that I can cut down the words "for the benefit of" which I have already construed. It is to be remembered that this provision is rather artificial. It is only in the case of the contingency of attaining a specified age or marrying that it applies at all.

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When the contingency fails, through the person dying under the age and the money goes to somebody else, that other person, although he takes the accumulated income, and although his own other income during the time when that income was being accumulated was low enough to have given him relief from tax if he had had the accumulated income all the time, still does not get back the amount of the tax. The provision is limited, artificial and curious in its application, and does not mean that in all cases the income tax on a small income is to be refunded at the determination of the contingency one way or the other. It may be that it is a casus omissus and that the framers of the section have forgotten to say that somebody else might be entitled to the receipt of the income, or it may be that in this case as between the young lady and her trustees they can make her account; I do not know. All that I say is, that I do not think I am constrained by the circumstances to which I have alluded to limit the meaning of the words "for the benefit of any person" in a way in which I would not have limited them in an ordinary case. I must therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondent: *Gregory, Rowcliffe & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

J. R.

1927
May 23, 24.

WILLIAMS *v.* SANDERS (H.M. INSPECTOR OF TAXES).

Revenue—Income Tax—Schedule A—Tenement Property—Annual Value as one entire House or Tenement—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, No. VII., r.* 8 (*c*).

No. VII., r. 8 (*c*), of Sch. A to the Income Tax Act, 1918, enacts that to ascertain the annual value for the purpose of assessment under that schedule of a house or tenement let in different apartments or tenements and occupied by two or more persons severally it shall be assessed and charged as one entire house or tenement:—

Held, that the annual value was the aggregate of the hypothetical rack rents of the separate tenements, and not a hypothetical rack rent for the whole payable by one who would then sublet its separate tenements for the sake of profit.

CASE stated by Commissioners for the General Purposes of the Income Tax for Roborough, South Devon.

(1.) At a meeting of the commissioners on July 15, 1924, Arthur Lawrence Williams (called herein "the appellant") appealed against an assessment to income tax (Sch. A) in the sum of 50*l.* gross made on him for the year ending April 5, 1924, in respect of a messuage and premises known as 39 Admiralty Street, East Stonehouse, Plymouth. (2.) The said premises consisted of a house or building owned and let by the appellant in four different apartments or tenements under separate weekly tenancies, each terminable upon one week's notice by either landlord or tenant. The four different apartments were occupied by four distinct tenants and their families, with the use in common of the passages, stairs, washhouse, w.c., and front and back entrances. The tenants belonged to the poorer classes and paid for the above apartments the respective weekly rents of 10*s.* 6*d.*, 7*s.*, 3*s.* 9*d.* and 6*s.*, making the aggregate weekly rental of 1*l.* 7*s.* 3*d.*, the appellant paying all the rates, water rates and inhabited house duty. All these rents were fixed by agreements which commenced within the seven years preceding the April 5 next before the time of making the assessment appealed against. (3.) The appellant by his representative, Mr. Body, rating surveyor, put in evidence the following estimate of the annual value of the premises in respect of the year ending April 5, 1923—namely :—

“ Gross income from 4 weekly tenants if fully occupied: 1*l.* 7*s.* 3*d.* × 52		£70 17 0
Deduct to convert from 4 weekly tenements into annual value in one letting of the whole house, 20 per cent.		14 3 0
		£56 14 0
Deduct:—		
Inhabited house duty, 36*l.* at 3*d.*	9 0	
Rates or estimated rateable value 29*l.* at 13*s.* 2*d.*	19 1 10	
Water rate, 36*l.* at 4 per cent.	1 3 2	
		20 14 0
Rack rental value		£36 0 0
Deduct statutory allowance for repairs, one-fourth	9 0 0	
Conventionary rent	1 12 0	
		10 12 0
Nett		£25 8 0

(4.) Mr. Body in evidence in support of this estimate stated that he arrived at the figures therein contained upon the assumption that for the purposes of income tax annual value must be understood to be the rack rent at which the premises are worth to be let by the year, and that such rent was to be estimated by considering what a single intending tenant by the year of the whole of such premises so occupied and used would pay as rent if such tenant bore the usual tenant's rates and taxes. That to compute such rent it was necessary to consider a hypothetical tenant and the rent he would give having due regard to what he was able to obtain from actual or hypothetical sub-tenants, and the profit he would expect in recompense for his time and trouble in management, and that in considering the rent he would give such tenant would have regard, and that consequently the commissioners should have regard to the probability of some part or the whole of the premises remaining unlet and on his hands for part of his period of tenancy, and that the hypothetical tenant of the whole premises would not be of the same class as those tenanting the tenements therein, nor moved to acquire his tenancy by the same objects, and that, consequently, the actual rents paid for the separate tenements must be regarded as only a factor to be taken into account and not a starting point or basis of calculation in computing the rack rent. It was not suggested by Mr. Body that the rents actually payable for the separate tenements were capable of increase or decrease, nor did he suggest that a single tenant for the whole premises could be obtained except for the purpose of farming out the premises at rents corresponding to those actually payable.

It was given in evidence that considerable sums of rent were in arrear, that the chance of their recovery was small, and that losses due to sickness, unemployment, poverty and dishonesty were invariably attendant on this class of property and type of tenant.

The assessment of the property for 1922–23 to poor rate was 28*l.* gross and 22*l.* rateable, the actual rates paid being 15*l.* 18*s.* 2*d.* It was argued that it is a common practice for rating authorities to ascertain new assessments for Sch. A, and if the annual value under that schedule is increased to raise the annual value for rating purposes. It was contended that the rates payable would have been estimated by an intending tenant on the basis of the rent he agreed to pay, and on that footing the rates would probably be at least 20*l.* 5*s.* and would have been estimated as at least that amount by an intending tenant at all material times, and the appellant contended that in estimating the rack rent which would be payable by a tenant of the whole premises this increase should be taken into account by the commissioners as it would be by the tenant in estimating the rent he would pay. (5.) Mr. Body also stated that his estimate was based also on his experience of this and other properties in the locality in considering the relation between the rent that a tenant of the whole house would pay annually as contrasted with the amounts payable by several weekly tenants of these four tenements.

It was contended on behalf of the appellant: (*a*) That No. I., r. 1, of Sch. A of the Income Tax Act, 1918 (1), did not apply. (*b*) That the direction in r. 8 of No. VII. of Sch. A (1) to assess and charge such premises as one entire house or tenement involved, in the circumstances hereinbefore mentioned, the application to them of r. 2 of No. I. of Sch. A, and thus introduced all the considerations mentioned in cl. 4 of the Case.

It was further contended that Sch. A, No. IV., rr. 1, 2, 7 and 10, and No. V., r. 8, referred to an owner or tenant of the unit of assessment and not to tenants of apartments or tenements, and that No. VII., r. 4, did not give exemption to nor give power to income tax authorities to remit tax on unoccupied parts of a house.

In support of his argument the appellant cited *Stevens* v. *Bishop* (2), and contended that *Tennant* v. *Smith* (3); *Attorney-General* v. *London County Council* (4); *Russell* v. *Coutts* (5); and *Grinter* v. *Fleming* (6) did not apply.

The inspector of taxes contended that the assessment should be made in the sum of 51*l.* 10*s.* gross, in support of which (inter alia) contention, he put in as evidence the following schedule, namely :—

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(1) Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. A, No. I. (General rule for estimating the annual value of lands, tenements, hereditaments or heritages): "In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value (except the properties mentioned in No. II. and No. III. of this Schedule), the annual value shall be understood to be :—

(1.) The amount of the rent by the year at which they are let, if they are let at rack rent and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment; or

(2.) If they are not let at a rack rent so fixed, then the rack rent at which they are worth to be let by the year."

No. VII., r. 8: "The assessment and charge shall be made upon the landlord in respect of . . . . (*c*) any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement."

(2) (1887) 19 Q. B. D. 442.

(3) [1892] A. C. 150.

(4) [1907] A. C. 131.

(5) (1881) 9 R. 261; 1 Tax Cases, 469.

(6) [1900] 2 Q. B. 735.

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WILLIAMS
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Gross rental of No. 39 Admiralty Street, East Stonehouse		£70 17 2
Deduct rates	£15 18 2	
,, inhabited house duty .	12 6	
,, $\frac{1}{26}$ gross rents	2 14 6	
		19 5 2
		£51 12 0

Say 51*l.* 10*s.*

He cited the following cases: *Biddle* v. *Morris* (1); *Grant* v. *Langston* (2); *Farmer* v. *Cotton's Trustees* (3); *Turner* v. *Carlton* (4); and *Russell* v. *Coutts.* (5)

The commissioners gave their decision in the following terms: "We take the view that in the case of properties let at a weekly rent or let to more than one tenant, the gross rents less the rates paid by the owner, less a contingency balance of $\frac{1}{26}$ of the net rents at the time of making the assessment, represent the rack rent, and therefore we make the assessment of 39 Admiralty Street, East Stonehouse, 48*l.*"

The appellant thereupon required the commissioners to state this case.

Hawke K.C. and *H. E. Kingdon* for the appellant.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the respondent.

ROWLATT J. In this case, at the request of counsel, I have postponed giving my judgment until I had heard the case of *Norwich Union Life Insurance Society* v. *Embleton* (6), which was somewhat in pari materia.

In the present case the contest between the parties was as to the effect of legislation on the property in question, which was a house or building divided up and let in working class tenements weekly, with the common use of the stairs and certain accessories. An assessment was made in respect of this building upon the landlord by virtue of No. VII., r. 8 (*c*), of the rules of Sch. A to the Income Tax

(1) [1924] 2 K. B. 490.
(2) [1900] A. C. 383.
(3) [1915] A. C. 922.
(4) [1909] 1 K. B. 932.
(5) (1881) 9 R. 261; 1 Tax Cases, 469.
(6) 6 Annotated Tax Cases (Needham), 544 (continuing Accountant Tax Cases).

Act, 1918. That rule provides, reading it shortly, that the assessment and charge shall be made upon the landlord in respect of any house or any building let in different apartments or tenements and occupied by two or more persons; any such house or building is to be assessed and charged as one entire house or tenement. Mr. Hawke said that as this house had to be assessed as one entire house or tenement then, when one looks to the annual value, which is the amount that it is worth to let by the year at a rack rent, one has to look for a hypothetical rack rent for the house or building as one entire house or tenement; and he said that one cannot let a tenement of this kind as one entire house or tenement unless to somebody who takes it as a middleman in order to let it out in weekly tenancies; and it is contended that a middleman would not do that unless there was a profit to him, and that, consequently, the weekly rents paid by the tenants are not the immediate basis of the annual value, but are relevant only in so far as they influence the middleman in deciding what rent he will pay.

I think that contention is untenable. The purpose of this rule is to make it clear that the tax in respect of these houses is to be charged on the landlord and not on the occupiers, which is the prima facie rule as laid down by r. 1 of No. VII., which is headed: "Rules as to persons chargeable." We find in r. 8 (*c*) of No. VII. a direction that the assessment in respect of these premises shall be charged to income tax upon the landlord, and the words "as one entire house or tenement" mean that there is to be one charge upon the landlord; I do not think that it lets in a speculation as to a middleman at all. What the house is worth to be let at a rack rent is the sum of the rack rents that can be got for the house, and I do not see that it is any the less so because it is received piecemeal. It is not necessary, to give effect to the purpose of this rule, which is to make the landlord assessable in one entire assessment, to introduce an alteration in the principle of valuation. Mr. Hawke laid some stress on the circumstance that the house or building is to be assessed. That only means that the landlord is to be assessed in respect of the house or building. I think that contention is made a little stronger by reference to s. 36 in the old Act, the Income Tax Act, 1853 (16 & 17 Vict. c. 34), (which is in substance reproduced in r. 8 (*c*) of No. VII. in the Act of 1918), where the words were different: "Any house or building let in different apartments" and so on, "shall nevertheless be charged to the duty under this Act as one entire house . . . . and the assessment thereof shall be made on the landlord." But even so, I think that the answer is the same. "Any house or building let in different apartments"—all the time the legislature is looking to the letting of apartments. It does not come into contemplation that there shall be any hypothetical letting to an intermediary in the way that is contended for. I think that is clear, and the well known case of *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (1) is of material assistance in support of that view. Therefore I think Mr. Hawke's argument fails. I think this case must go back to the commissioners, because I do not think they have followed the right reasoning. They have said: "We take the view that in the case of properties let at a weekly rent or let to more than one tenant the gross rents less the rates paid by the owner less a contingency balance of $\frac{1}{26}$th of the net rents at the time of making the assessment represent the rack rent." What they have done is to construct a profit and loss account and to see how much was to come in, and they have taken the weekly rents and knocked off $\frac{1}{26}$th for contingencies, as they call them, and have taken that as the rack rent. That is wrong. They are right in taking and adding together the rents of the tenements, but they are wrong in taking and adding together the weekly rents with a discount. They have no right to do that. If they are going to take the weekly rents of the tenements and add them together they must find out what the particular tenements are worth to let at a rack rent by the year and nothing else than that; it must be by the year. They must say what a man would give if he had to take the place for

(1) (1876) 1 Ex. D. 469.

a year and to be responsible for a year, and then when they have done that, they can add them up and allow for the rates, et caetera, and that will be the correct figure.

I do not know what the result will be. It may be that it will reduce the assessment to something very small, it may not affect it, it may increase it; I do not know. But that is what they must do, and they must not take weekly rents and add them up and then knock off a discount to account for the irrecoverables and voids, or something of that sort. It is not permitted by the Act.

There was some discussion about the proper way of deducting rates, but I do not propose to deal with that, because I do not think that point was raised in the case.

Appeal dismissed.

Solicitors for appellant: *Royds, Rawstorne & Co., for Square, Geake & Windeatt, Plymouth.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

W. L. L. B.

GRAINGER *v.* SINGER.

1927
May 23, 30.

Revenue—Case stated—Requisition of Case by Surveyor of Taxes—Case sent by Commissioners to vacated Office of Surveyor—"Receiving the same"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 149, *sub-s.* 1 (*d*).

Sect. 149, sub-s. 1 (*d*), of the Income Tax Act, 1918, directs that a person requiring a case to be stated by commissioners of income tax must transmit it to the High Court "within seven days after receiving the same." After stating a case the commissioners sent it to the office of the person requiring it, the surveyor of taxes, at the office occupied by the latter at the time the appeal was before them, the address of which was on all the official documents in the appeal. In fact the surveyor had left the office in the interval and gone to another one:—

Held, that the case had been "received" by the surveyor within the meaning of the Act.

CASE stated by Commissioners for the General Purposes of the Income Tax for Kensington in the county of Middlesex.

At a meeting of the commissioners on December 14, 1922, Miss W. Singer (called herein "the respondent") appealed against an assessment under Sch. D to the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), made upon her of 619*l*. 10*s*. for the year 1919–1920 in respect of income from foreign possessions. The commissioners discharged the assessment. The inspector of taxes (Mr. J. F. Grainger, called herein " the appellant ") expressed his dissatisfaction with this determination and, in accordance with the provisions of s. 149 of the Income Tax Act, 1918, required the commissioners to state this case. On the case coming on for argument before Rowlatt J. the respondent took the preliminary objection that the appeal was out of time, under the following circumstances.

By s. 149, sub-s. 1 (*d*), of the Income Tax Act, 1918 : " The case shall set forth the facts and the determination of the commissioners, and the party requiring it shall transmit the case, when stated and signed, to the High Court, within seven days after receiving the same." The hearing of the appeal was on December 14, 1922. Three years and eight months later the case was stated and sent by the commissioners addressed to the appellant to the office to which the business had been attached at the time of the appeal, when it was occupied by the appellant, and it was delivered there on August 24, 1926, his successor as surveyor of taxes, Mr. Whitaker, being in occupation. In the interval, in October, 1923, the appellant had left this office, and had gone to another office. Through some delay, for which Rowlatt J. held nobody was to blame, the case did not reach the appellant until September 2, 1926, more than seven days after it was received at the appellant's former office. On its receipt by the appellant he at once transmitted it to the High Court. The respondent contended that the appellant had " received " the case within the meaning of s. 149, sub-s. 1 (*d*), of the Act on August 24, when it was delivered at his former office, and that therefore he had not transmitted it " within seven days after receiving the same " within the meaning of the sub-section. It was admitted that if he did not " receive " the case until September 2, when in fact it reached him, he had transmitted it in time.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the appellant.

Edwardes Jones K.C. and *Beazley* for the respondent. There is a preliminary objection. The appeal is out of time. The case was "received" by the appellant within the meaning of s. 149, sub-s. 1 (*d*), of the Income Tax Act, 1918, when it was left at the office on August 24, 1926. That was the office to which the business of this particular appeal was attached and the office whose address appeared on all the official documents relating to that business. If the appellant had died his successor would have "received" the case as an officer of the Court, for the appellant was only named as a party as an officer of the Court, and had no personal interest in it whatever. It would be very inconvenient if it were held that the commissioners must seek out the appellant.

[*Godman* v. *Crofton* (1) was referred to.]

Sir Douglas Hogg A.-G. and *R. P. Hills* for the appellant. Sect. 149 makes the parties to the case the taxpayer and the surveyor of taxes, and no one else. Here Miss Singer is the taxpayer and Mr. Grainger the surveyor, and if either had died the executor would then be the party. The appellant's successor, Mr. Whitaker, was not a party. And there is nothing in the Act making the office of the appellant an address for appeal, therefore it is not right to say that the address on the documents is the address for appeal. A party receives the case when in fact it reaches his hands or those of an authorized agent.

Edwardes Jones K.C. in reply.

Cur. adv. vult.

1927. May 30. ROWLATT J. In this case an objection was taken to the appeal by the Crown that the appeal was out of time. Sect. 149, sub-s. 1 (*d*), of the Income Tax Act, 1918, says: "The case shall set forth the facts and the determination of the commissioners, and the party requiring it"—that party was the appellant, the inspector in this instance—"shall transmit the case, when stated and signed, to the High Court, within seven days after receiving the same." Nothing is said about the place to or the time in which the case is to be sent to the party requiring it, and there is nothing express to require that it shall be sent at all. Perhaps it was assumed that he would call for it. Now the dates are these. The hearing was on December 14, 1922. Ten months elapsed and nothing happened, and the appellant left the office with which this case is connected and to which it was assigned, on October 24, 1923, and went to another office. On March 27, 1924, fifteen months after the hearing, the case was sent to the respondent's solicitor, and he lost it. Two years and five months more elapsed, and we come to August, 1926, and then the case was stated and was sent by the courtesy of the commissioners to the office to which the business had originally been attached and where the appellant used to be when the matter arose. In the course of post on August 24 it was received at that office, but the acting inspector, Mr. Whitaker, was away for the day, and there were other papers on his table when he came back. Owing to some little exigency of that kind—I do not think there is any blame to be attached to anybody—two or three days elapsed, and it was not until September 1 that the case was sent to the Commissioners of Inland Revenue and sent by them to the Solicitor of Inland Revenue, who had intervened in the matter, on September 2. It is not denied that when it got to the Solicitor of Inland Revenue it had been "received" by the appellant within the meaning of the rule, but it is contended that it must be taken to have been "received" by him on August 24, 1926, when it was received at the office to which he had belonged when the appeal was initiated. If so, the appeal is out of time. If it was not "received" until it got to the solicitor who it was admitted on behalf of the Crown was the agent of the appellant to receive it, then the appeal is within time. It is not disputed on behalf of the Crown that the requirement of the section is peremptory, and that if the time is not observed the appeal cannot be heard.

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(1) [1914] 3 K. B. 803.

The Attorney-General contended that the appellant was a party personally to the appeal, and that he himself must receive the case; that if he is transferred he still remains the party; that the contest does not pass to his successor, and that if he dies it must be conducted by his executors. I have never yet seen executors in these cases, but it may be that that is the right position. The question therefore simply is, was the original office his agent to receive it? Clearly it is not so by statute. The statute says nothing about any address for service or any form of sending the case which shall be binding, nor can it be said that the office was his agent by estoppel. There is no room for estoppel here, because the party sending it to that office and acting on the belief that that was the appellant's address for that purpose was not the opposite party in the case, but the tribunal stating the case. Therefore the question is whether the old office was his agent in fact. I must assume that while he was attached to the office it was his agent to receive documents connected with his business at that office. And of course if the solicitor intervenes he is also his agent, but apart from that I cannot believe that it is necessary that the appellant should receive the case in his hands or on his desk. It must be that when it is sent to the office to which he is attached and where he is carrying on his duties, that that is a receipt by him. But when he leaves I will assume that he takes the business of a pending appeal with him. Then the question is, is the authority of the office to receive for him communications in respect of an appeal arising out of the business of that office withdrawn in fact? Of course it would be inconvenient, because the commissioners would not know that he had gone. There is nothing in the affidavit on behalf of the Crown to say that they had reason to suppose that he had gone, and the old office would hardly have been doing their duty if they had returned the letter marked "Gone away" or anything to that effect. Is it not the duty of the office to take it in and forward it, if necessary, or to give it to the surveyor if he is still there? They did so, in fact, but the question is whether it was their duty to do so. I think presumably it was, and if it was not, if their authority had been withdrawn in fact, that could very easily have been stated in the affidavits on behalf of the Crown, and it has not been stated. Therefore I think that this objection succeeds. I come to the conclusion, if I may say so, with very great regret, but I must decide the matter upon the law as I understand it.

I have drawn attention to the great delays that have taken place in this case. I do not want to be understood to say that it is the fault of the revenue authorities, because it is not the fault of the revenue any more than of anybody else; but perhaps I may suggest that it would be a good thing if some step was taken to fix a time within which these cases must be stated. Here it was four years that were taken in the process.

My judgment is that the appeal must be dismissed with costs.

Preliminary objection upheld.
Appeal dismissed.

Solicitor for respondent: *J. Bransbury.*
Solicitor for appellant: *Solicitor of Inland Revenue.*

W. L. L. B.

NORWICH UNION *v.* HENSTEAD UNION.

1927
May 5.

Poor Law—Settlement—Child—Derivative Settlement—Foreign Father living having no Settlement—Mother living having Settlement—Divided Parishes and Poor Law Amendment Act, 1876 (39 *&* 40 *Vict. c.* 61), *s.* 35.

By s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876: "No person shall be deemed to have derived a settlement from any other person . . . . except in the case of . . . . a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

The pauper's father was living, but was a foreigner who had no settlement, but the mother had a maiden settlement:—

Held, that the pauper, an adult, did not derive a settlement from her mother, because the latter not being "widowed," the case did not come within the exceptions from the enacting clause at the beginning of the section, and that, consequently, the pauper, having acquired no settlement for herself, must be relegated to her birth settlement.

Case stated under Baines' Act (12 & 13 Vict. c. 45), s. 11 (Quarter Sessions Act, 1849).

On November 5, 1926, the Henstead Union (called herein "the respondents") obtained an order of two justices of Norfolk, adjudging the parish of Norwich in the Norwich Union (called herein "the appellants") to be the place of the last legal settlement of Alice Louise Dezert, a pauper lunatic (called herein "the pauper lunatic"), thirty years of age, confined in the Norfolk County Asylum and chargeable to the respondents. The appellants gave due notice of appeal against the said order to the Norfolk Quarter Sessions, and afterwards, by consent and by order of Shearman J., the present case was stated, the material parts of which were as follows:—

The pauper lunatic was the lawful child of Edmond Eugene Dezert and Susannah Dezert, formerly Ashley, who were married at Norwich on December 17, 1892. She was born in the parish of Great Yarmouth on June 19, 1896, and thereafter resided in various parishes in England with her father until 1901, when she accompanied him to France, and did not return to England until 1920. From 1920 to 1925 she resided in various parishes in England and on December 20, 1925, she was removed from her mother s house in the parish of Framingham Pigot in the respondent union to the said asylum, where she became chargeable to the respondents. Edmond Eugene Dezert was a Frenchman, and he returned to France in 1901, where he had resided since. At no time did he acquire a legal settlement in England. Susannah Dezert resided with her husband, Edmond Eugene Dezert, from 1892 to 1920, when she left him in France and returned to England, where she had since resided. She was born in May, 1859, in the parish of Norwich, and before marriage had acquired a settlement by residence therein.

The appellants contended that the pauper lunatic must be deemed to be settled in the parish of Great Yarmouth by reason of her birth therein. The respondents contended that she must be deemed to have derived the same settlement as her mother—namely, the parish of Norwich in the appellant union.

By s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61): "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

Herbert Davey for the appellants. The order of the justices was wrong. The pauper lunatic could not derive a settlement from her mother, because by s. 35 of the Act of 1876 she would only take the settlement, in the present circumstances, of a "widowed" mother, and the husband of the mother is still alive. But as every English person born in this country must have a settlement—*Reg.* v. *All Saints, Derby* (*Inhabitants*), per Coleridge J. (1)—and none other can be found for her, she is settled in Great Yarmouth, the place of her birth, under s. 1 of the Poor Relief Act, 1662 (13 & 14 Car. 2, c. 12).

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(1) (1849) 14 Q. B. 207, 216.

The Act of 1876 altered the law, for, previous to that, a pauper lunatic in the present circumstances, when unemancipated, took the maiden settlement of the mother—Burn's Justice of the Peace, 30th ed., vol. iv., p. 336 (1)—and would retain it after emancipation until he acquired a settlement of his own. The legislature, which must be presumed to have known the law, deliberately did not adopt it, but enacted s. 35 of the Act of 1876.

[*Reigate Union* v. *Croydon Union* (2) and *Wycombe Union* v. *Barton-upon-Irwell Union* (3) were also referred to.]

Hugh Goitein and *A. S. Leighton* for the respondents. The pauper lunatic was settled in the parish of Norwich, the maiden settlement of her mother, a derivative settlement not abolished by s. 35 of the Act of 1876. Previous to that Act she would clearly, in circumstances similar to the present, have taken that settlement, and s. 35 has not altered the law in that respect. Lord Watson said in *Reigate Union* v. *Croydon Union* (4): "Shortly stated, my opinion comes to this, that the effect of s. 35 is . . . . (5.) subject to these provisions and limitations [not here material] to reserve to children the same rights in relation to parentage settlement which they possessed under the then existing law." Lord Watson's judgment has been treated as the response of the House of Lords to a wish expressed by the Court of Appeal for an authoritative interpretation of the section: see the judgment of Lord Esher M.R. in *West Derby Union* v. *Atcham Union* (5), and that section must now be interpreted in the light of Lord Watson's rules as set out in the *Reigate* case (2)—*West Derby Union* v. *Atcham Union*. (6) The cases of *Tendring Union* v. *Braintree Union* (7) and *Lexden and Winstree Union* v. *Windsor Union* (8), in which Lord Watson's observations were treated as obiter dicta, were overruled in *Wycombe Union* v. *Barton-upon-Irwell Union*. (3) The word "widowed" was inserted only exempli gratia,

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(1) See also *Rex* v. *St. Paul's, Shadwell* (*Inhabitants*) (1722) 2 Sess. Ca. 119 (Case 113).

(2) (1889) 14 App. Cas. 465, 481.

(3) [1927] A. C. 217.

(4) 14 App. Cas. 465, 484.

(5) (1889) 24 Q. B. D. 117, 119.

(6) 24 Q. B. D. 117.

(7) [1920] 2 K. B. 647.

(8) [1921] 2 K. B. 143.

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that being the most common case where a child derives settlement from its mother; but that does not exclude other cases possible under the old law.

[*West Ham Union* v. *Holbeach Union* (1) was also referred to.]

LORD HEWART C.J. This is a special case stated under the provisions of Baines' Act. The short point is that a pauper lunatic whose father, a foreigner, never acquired a legal settlement in England, became chargeable as a pauper lunatic in a certain place. Application was made for an order of removal and that order provided that the charge for her fell upon the Norwich Union, inasmuch as she was settled therein. From that order the Norwich Union appeals.

The argument for the appellants was that the pauper lunatic could not be settled in Norwich, because that meant a derivative settlement from her mother, and that she must be deemed to be settled in Great Yarmouth, her birthplace. The question turns on the true construction of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876. That section provides: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." There have been cases in which portions of this section have been construed by the Courts, and differences of opinion have made themselves manifest. But we are expressly told that upon this particular point there is no authority, and the matter, therefore, comes before this Court as res integra. In *West Ham Union* v. *Holbeach Union* (2) Lord Macnaghten, speaking of the first clause, said: "By the first clause of s. 35 all derivative settlements are abolished with two exceptions—one in the case of a wife, which has no application to the present question; the other in the case of a legitimate child under the age of sixteen."

(1) [1905] A. C. 450.

(2) [1905] A. C. 453.

That, if I may say so with great respect, seems to be a perfectly clear analysis of a sufficiently clear provision in the statute. "No person shall be deemed to have derived a settlement from any other person . . . . except"—the section begins with a universal negative proposition; it then proceeds to particular and limited exceptions, and so far as a child is concerned, the exception is expressly limited to the case of a child under the age of sixteen "which child shall take the settlement of its father or of its widowed mother." The section, it may be, assumed that in the case of any child with regard to whom a question of derivative settlement might arise there would be either a father from whom a settlement might be derived or a widowed mother from whom a settlement might be derived. It may be that it regarded those cases as exhaustive, and so the words were added "as the case may be." The legislature does not seem to have contemplated a third case, that of a father who is alive and a foreigner not having acquired a settlement. If that be so, the particular case revealed by the facts of this appeal constitutes a casus omissus, and, as no case comes within the exception except those which are expressly mentioned, it follows that the enacting words of the section apply. Whether the true view be that this is a casus omissus or whether it be that the legislature must be taken to have considered this case and not included it in the exceptions, in either event, upon the clear construction of this part of the section, this case is not included in the exceptions. It follows, therefore, that with regard to this pauper lunatic there is no possibility of a derivative settlement. And so the question what is her settlement depends upon other considerations and she is remitted to the place of her birth. As was said in *Reg.* v. *All Saints, Derby* (*Inhabitants*), by Coleridge J. (1): "It is an established principle that every English subject has a settlement by birth prima facie; that is, till an acquired settlement is shown."

In the course of the argument various matters have been considered which in my opinion do not really arise. We are

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(1) 14 Q. B. 207, 216.

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not concerned now with the true interpretation of the third clause in the section. We are dealing, and dealing for the first time, with the true interpretation of the first part of s. 35. Regarding the matter in that way I think this appeal succeeds.

AVORY J. I am of the same opinion, and I incline to the view that the present is a casus omissus; in other words the framers of the first branch of the section contemplated that every child under sixteen will have a father who has a settlement, or, if the father is dead, a widowed mother who has a settlement. In the present case this pauper lunatic, when under sixteen, and in fact since that time, has never had a father with a settlement nor has she had a widowed mother with a settlement of her own. The result is that she is a person who by the statute is not to be deemed to have derived a settlement from any other person, and, consequently, is relegated for her settlement to the place of her birth.

SHEARMAN J. I agree.

Appeal allowed.

Solicitors for appellants: *Vizard, Oldham & Co., for Mills & Reeve, Norwich.*

Solicitors for respondents: *Godden, Holme & Ward, for W. E. Ripley, Norwich.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.
1927
June 21, 22 ;
July 4.

MACKENZIE-KENNEDY *v.* AIR COUNCIL.

[1925. M. 2796.]

Crown—Tort—Action against Air Council—Whether competent—Air Force (Constitution) Act, 1917 (7 *&* 8 *Geo.* 5, *c.* 51), *s.* 10.

An action for tort will not lie against the Air Council:—
So *held* per Bankes and Atkin L.JJ., and *semble,* per Scrutton L.J.
Held, per Scrutton L.J., that the statement of claim should be struck out and the action dismissed on the ground that the matter was res judicata by a decision of Lawrence J.
Semble, per Atkin L.J.: The Air Council is not a corporation.

Appeal from an order of Fraser J. in chambers.

By his statement of claim the plaintiff said that he was a designer of aeroplanes and/or owner of certain inventions and novelties in relation to aeroplanes; that by contracts in writing dated July 8, 1915, and July 5 and 6, 1916, he, in agreed confidence and secrecy as between himself and the defendants, constructed for and supplied to them an aeroplane according to his said invention, and received in 1920 the sum of 31,000*l.* from the defendants in respect of his work, materials supplied, and money expended by him in and about the construction of the aeroplane; that on various dates before the contract of 1915 and also subsequently and in confidence and secrecy he submitted to the defendants certain reports, specifications, plans, etc., relating to his invention; and that the defendants, wrongfully or fraudulently, secretly converted to their own use and detained from him those reports, etc., and conspired with Mr. Handley Page in so doing, whereby he suffered damage. He claimed the return of the documents, damages for fraud and conspiracy, and an injunction restraining the defendants, their servants or agents from using the documents.

The defendants applied in chambers that the statement of claim should be struck out on the grounds: (1.) that the action was frivolous and vexatious; (2.) that the statement of claim disclosed no cause of action; and (3.) that the matter was res judicata by reason of the judgment of Lawrence J. in *Rowland and Kennedy* v. *Air Council.*(1) In that action Lawrence J. held that the Air Council never communicated to Mr. Handley Page any information given them by the present plaintiff; that no information that was either novel or useful was communicated by the present plaintiff to the Air Council; that the Air Council was not liable to be sued on any contract made by them on behalf of the Crown; and that the plaintiff's claim for a declaration of the validity of a patent in respect of part of the aeroplane failed. From that decision the plaintiff appealed. The Court of Appeal on June 20 and 21, 1927, dismissed the appeal, holding that the claims for a declaration of the validity of the patent failed, and that the claims in contract could be raised only by petition of right and not by action. The Court found it unnecessary to deal with the other points decided by Lawrence J.

Master Bonner struck out the statement of claim, but, on appeal, Fraser J. took the view that the action should not be summarily dismissed, and he accordingly reversed the order of the Master, but gave leave to appeal.

The defendants appealed.

Giveen (*Sir Douglas Hogg A.-G.* with him) for the appellants. The Court has an inherent jurisdiction to strike out a statement of claim which is frivolous and vexatious. In this case that jurisdiction ought to be exercised, because the points raised by the statement of claim were all involved, or could have been raised in the action tried by Lawrence J. Moreover the Air Council is in the same position as other departments of State in that no action will lie against it for tort: see *Raleigh* v. *Goschen*(2); *Bainbridge* v. *Postmaster-General*(3); *Roper* v. *Public Works Commissioners*(4); and in *Rowland* v. *Air Council*(5) Russell J. expressly held that the Air Council was not liable to be sued in such an action. Dealing with the point arising under s. 10 of the Air Force (Constitution) Act, 1917 (1), which says that "the Air Council may sue and be sued, and may for all purposes be described, by that name," he held that it did not confer new rights in derogation from the Crown.

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(1) (1925) 41 Times L. R. 545.

(2) [1898] 1 Ch. 73.

(3) [1906] 1 K. B. 178.

(4) [1915] 1 K. B. 45.

(5) [1923] W. N. 64.

The respondent in person contended that s. 10 of the Act of 1917 entitled him to sue the Air Council.

Cur. adv. vult.

July 4. The following judgments were read:—

BANKES L.J. The respondent commenced an action in the King's Bench Division to which he made the Air Council defendants. The exact nature of his claim is set out in paras. 6 and 7 of the statement of claim. It is plain that the action is one founded on tort. In support of his claim the plaintiff delivered particulars of matters going back in date as far as July, 1909.

Application was made in chambers to strike out the statement of claim, or to dismiss, or stay the action, on the grounds: (1.) that the action was frivolous and vexatious, and an abuse of the process of the Court; (2.) that the statement of claim disclosed no cause of action; (3.) that the matter was res judicata. In support of the last ground the judgment of Lawrence J. (as he then was) was relied on. This judgment was recently affirmed in this Court, but those portions of the judgment which are relevant to the present contention were not gone into, as it became unnecessary to do so. For this reason I do not propose to deal with this question of res judicata, as it would involve a long investigation of a mass of detail. I am not suggesting any doubt as to the correctness of the learned judge's conclusions, but as no decision was come to upon them in this Court I prefer to rest my judgment on other grounds.

With regard to the first ground, I will only say that inasmuch as the Air Council only came into existence in the month of January, 1918, it is manifest that to a very

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(1) The other material sections of that Act are set out in the judgment of Bankes L.J.

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large extent the plaintiff's claim must be frivolous and vexatious.

I rest my judgment, however, upon the second ground of objection, and for the following reasons. The action is plainly one of tort, and is founded upon acts and matters which are alleged to have been done by the Air Council in its capacity as Air Council. The Air Council is a statutory creation. It was established by the Air Force (Constitution) Act, 1917, ss. 8, 9 and 10 of which provide as follows: s. 8, sub-s. 1: "For the purpose of the administration of matters relating to the Air Force and to the defence of the realm by air there shall be established an Air Council consisting of one of His Majesty's Principal Secretaries of State, who shall be President of the Air Council, and of other members, who shall be appointed in such manner and subject to such provisions as His Majesty may, by Order in Council, direct." Sub-s. 2: "His Majesty may, by Order in Council, fix the date as on which the Air Council is to be established, and make provision with respect to the proceedings of the Air Council and the manner in which the business of the Council is to be distributed among the members thereof." Sub-s. 3: "On the establishment of the Air Council, the Air Board constituted under the New Ministries and Secretaries Act, 1916, shall cease to exist, and all the powers, duties, rights, liabilities, and property of that Board shall be transferred to the Air Council, but nothing in this sub-section shall affect any orders, instructions, or other instruments issued by the Air Board, and all such instruments shall have effect as if issued by the Air Council." Sub-s. 4: "His Majesty may, by Order in Council, transfer from the Admiralty, or from the Army Council, or the Secretary of State for the War Department, to the Air Council or the President of the Air Council such property, rights, and liabilities of the Admiralty or Army Council or Secretary of State as may be agreed between the Air Council and the Admiralty or the Army Council, as the case may be." Sect. 9, sub-s. 1: "The Air Council may appoint such secretaries, officers, and servants as the Council may, with the sanction of the Treasury, determine." Sub-s. 2: "There shall be paid, out of moneys provided by Parliament, to the members of the Air Council, and to the secretaries, officers, and servants of the Council, such salaries or remuneration as the Treasury may determine." Sect. 10, sub-s. 1: "The Air Council may sue and be sued, and may for all purposes be described, by that name." Sub-s. 2: "The Air Council shall have an official seal, which shall be officially and judicially noticed, and that seal shall be authenticated by the signature of the President, or of a secretary, or of some person authorized by the Council to act on behalf of a secretary."

By an Order in Council of December 21, 1917, made under s. 8 of the Act, the Air Force is directed to consist of a number of persons to whom official titles are given, and to whom definite official duties are assigned, some of whom are to be appointed by His Majesty, and others either by the Minister of Munitions or by the Secretary of State. Clause 4 of the Order is in the following terms: "Subject to the foregoing provisions as to the transaction of business in separate divisions, the powers and duties of the Air Council may be exercised and performed by any three of their number and notwithstanding that any office the holder of which is a member of the Air Council is temporarily vacant." Clause 3 of the Order provides that the Secretary of State, who by clause 1 is recognized as President of the Air Council, is to be responsible to His Majesty and Parliament for all the business of the Air Council, and that all business other than business which the Secretary of State specially reserves to himself is to be transacted in certain principal divisions. The clause then proceeds to make each individual member of the Air Force responsible for part of the work and of the business of the Force. It is clear from this outline of the constitution of the Air Council that it is a Department of State, and that the acts and matters of which the plaintiff complains in this action, if done at all, by members of the Air Council, or by their orders, were acts and matters done by virtue of their statutory position as members of the Air Council. In these circumstances it is, I consider, clear that no action for tort can lie against the statutory body which has been set up under the name of the Air Council.

There are many cases in the books in which the law has been laid down and applied. I will only refer to a few of them. In *Raleigh* v. *Goschen* (1) an attempt was made to make the Lords Commissioners of the Admiralty, and the Director-General of Naval Works, responsible for a trespass to land by making the Commissioners and the Director-General defendants to the action. Romer J. laid down the rule of law in these terms (2): "I will state some general principles of law which I conceive govern this class of cases; and if you challenge any portion of what I am about to say, then I will hear you in reply. It appears to me that if any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offence, he cannot prevent himself being sued merely because he acted in obedience to the order of the executive Government, or of any officer of State; and it further appears to me, as at present advised, that if the trespass had been committed by some subordinate officer of a Government Department or of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department in which the subordinate official was employed, or whatever his official position—could be sued; but in such a case the superior official could be sued, not because of, but despite of, the fact that he was an officer of State. I think it is clear that the head of a Government Department is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself; in which case he would be liable as an individual, just as a stranger committing the same act would be."

In *Gilbert* v. *Trinity House Corporation* (3), in which the corporation unsuccessfully contended that they were acting as servants of the Crown, both Day and Wills JJ. made observations upon the law which seem pertinent to the present case.

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(1) [1898] 1 Ch. 73.

(2) [1898] 1 Ch. 77.

(3) (1886) 17 Q. B. D. 795.

Day J. said (1): "All the great officers of State are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals." This is true of the members of the Air Council, though it was not the case with the Trinity House. Wills J. expresses a view which applies to the respondent's frequently repeated statement that he is suing the Air Council qua Air Council, and not as representing the Crown. The learned judge said (2): "I am clear that at common law there is no instance of any person or body having two distinct capacities—in one of which there is no liability to be sued because the person or body is the direct representative of the Crown, and in the other there is a liability to be sued because the capacity is that of a private corporation or a person."

In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on principle and upon authority, that no such action is maintainable. The Air Council are not a corporation, and even if they were to be treated as one the respondent's position would not be improved.

The most recent case on this point (apart from *Public Works Commissioners* v. *Pontypridd Masonic Hall Co.* (3) which I decided myself) is *Roper* v. *Public Works Commissioners* (4), decided by Shearman J. He there refers to an Irish decision (*Wheeler* v. *Public Works Commissioners* (5)), in which Palles C.B. makes the following observations upon the law on this particular point (6): "Now, if a corporation be constituted for the sole purpose of doing acts for the Crown, it is prima facie outside its powers to do anything, except for the Crown, and as in law a wrongful act cannot be done for the Crown, such a corporation is not capable of doing such wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation, but must be deemed the personal act of those who committed it."

(1) (1886) 17 Q. B. D. 801.
(2) Ibid. 803.
(3) [1920] 2 K. B. 233.
(4) [1915] 1 K. B. 45.
(5) [1903] 2 I. R. 202.
(6) Ibid. 229.

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The respondent, not unnaturally, relied in support of his contention that he had statutory authority for maintaining the action upon the provision in s. 10 of the Air Force (Constitution) Act, 1917, that the Air Council may sue and be sued, and may for all purposes be described, by that name. Instances might be given in which this provision would confer a right of action against the Air Council, but it is unnecessary to consider them, as for present purposes it is sufficient to say that I entirely agree with the view of Russell J. in *Rowland* v. *Air Council* (1) when applied to an action of tort, that the authority falls far short of what is necessary to get rid of so well known and so well established a constitutional rule of law as that which I have been discussing. On this point the decision of the Court of Appeal in *Bainbridge* v. *Postmaster-General* (2) is instructive. In that case it was decided that the Postmaster-General is not liable in his official capacity as head of the telegraph department of the Post Office for wrongful acts done by his subordinates in carrying on the business of his department, even though the provision in s. 42 of the Telegraph Act, 1863, that a telegraph company was to be answerable for injuries happening through the act or default of the company or of any person in their employment by reason of the company's works, was, by later legislation, to be read as applying to the Postmaster-General. In my opinion the whole of the reasoning of Collins M.R. in that case, both on the question whether all the officials of the Air Council who could have been responsible for the acts of which the respondent complains (if committed at all) were officers or subordinate officers of the Crown, and also on the question of the impossibility of reaching the revenue of the country by the present action, are relevant here.

I consider that the action is not maintainable against the Air Council. The appeal must be allowed, but, at the request of the Air Council, without costs.

SCRUTTON L.J. This is an appeal from an order of Fraser J. allowing an appeal against an order of Master Bonner

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(1) [1923] W. N. 64.

(2) [1906] 1 K. B. 178.

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striking out a statement of claim in the action on the grounds: (1.) that the action was frivolous and vexatious; (2.) that the statement of claim disclosed no cause of action against the appellants; (3.) that the matters involved were res judicatae.

To understand the position it is necessary to state the previous litigation. Mr. Kennedy had been concerned with various Government Departments during the war in the experimental manufacture of a very large aeroplane to carry bombs and guns. The transaction began with tenders to the Secretary of State for War in 1915 and 1916, accepted by him. This business gradually changed into experimental manufacture of an aeroplane. In the end of 1916 the New Ministries Act, 1916, set up an Air Board, which was apparently constituted by an Order in Council dated February 6, 1917, of the holders for the time being of certain offices, and additional members. It was not incorporated, and whilst as a Government Department the Air Board in fact carried on negotiations with Mr. Kennedy, no transfer of powers by Order in Council was ever made to it under s. 8 of the Act of 1916, nor was its name inserted in any contracts under s. 11, sub-s. 5, of that Act. An Act of 1917—the Air Force (Constitution) Act—established an Air Council which, by Order in Council, dated January 2, 1918, came into existence on January 3, 1918, its constitution being fixed by an Order in Council of December 21, 1917, as eight holders, for the time being, of named offices, and two additional members. It was not expressly incorporated, but s. 10, sub-s. 1, of the Act reads: "The Air Council may sue and be sued . . . . by that name." All "powers, duties, rights, liabilities, and property" of the Air Board were transferred to it: s. 8, sub-s. 3. One of its first acts was to stop all further work on Mr. Kennedy's aeroplane. He had spent a considerable sum of money on this work, and his first litigation was by a writ issued on June 25, 1919—*Kennedy* v. *Air Council* (1919, K. No. 359)—to claim remuneration for that work. His claim of over 40,000*l.* was on February 7, 1920, settled by agreement for 31,000*l.*, and a receipt was given in these terms: "I hereby acknowledge that I have this day received from the Treasury Solicitor on behalf of the Air Council the sum of Thirty one thousand pounds in full discharge of all claims which I may have against the Crown or against the Air Council in respect of the matters set out in a statement of claim delivered in an action entitled *Kennedy* v. *Air Council* (K. B. D., 1919, K. No. 359) and of all other matters arising out of such action including the costs incidental thereto." His next proceeding seems to have been a writ issued on August 12, 1921, by his trustee in bankruptcy, Mr. Rowland (1921, R. 2076), to which, by an odd and unsatisfactory agreement, Mr. Kennedy was added as a plaintiff at a much later stage. This claim went through several versions, but in its final form, after Mr. Kennedy was joined in 1924, it alleged a contract with the Air Council that secrecy should be maintained in respect of all documents connected with Mr. Kennedy's work, and a breach of such contract by communication of these documents in the latter part of 1917 and early 1918 "to a rival contractor Handley Page, and especially of communication of an invention of a gun cockpit in the tail of the aeroplane abaft the rudder." It will be noticed that anything before January 3, 1918, was done by the unincorporated Air Board, or its individual members, and not by the Air Council, which only came into existence on that date. There was added a claim in relation to a patent for that tail gun pit based on a denial of the validity of the patent by the Air Council.

A preliminary attempt to stop the action was made by an application to Russell J. (1) to strike out the claim on the ground that it was really a claim in contract against the Crown, which could only be brought by petition of right. This succeeded before Russell J., but the Court of Appeal took the view that the whole facts should be ascertained, and after many vicissitudes the action came on before Lawrence J. in May, 1925, when several days were spent in investigating the facts. The learned judge decided against the plaintiff on all points. He held: (1.) that an action of contract would not lie against the Air Council, contracting on behalf of the Crown; (2.) that the contract for remuneration for experimental research on which the plaintiff had recovered 31,000*l.* in his first action contained no provision for secrecy, and that the information and reports which the Air Council had paid for became their unfettered property; (3.) that there had been in fact no communication of matter to Handley Page, who had arrived at his results by independent investigation. The patent claim was disposed of on grounds irrelevant to the present appeal.

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(1) [1923] W. N. 64.

It will be noticed that if the plaintiff had any claim against the Air Council as a statutory body in respect of tort, as distinguished from a claim against named individuals for individual tortious acts, he could have included it in this second action. The question whether Mr. Kennedy had any property in his reports, plans, and documents so as to prevent the Air Council from using them, and to require delivery of them up to him, a claim for conversion or detinue, could have been decided on exactly the same evidence as was used by the judge to decide the question of contract. The question whether there was any conspiracy between the Air Council and Handley Page to use wrongfully Mr. Kennedy's information and documents could have been decided on the evidence given in the action in which the judge found no communication by the Air Council to Handley Page. If the findings of Lawrence J., which turned mainly on the credibility of the witnesses he saw, were correct there was no claim in tort for detinue, conversion, or conspiracy.

Mr. Kennedy appealed against the judgment of Lawrence J. by an odd arrangement by which he paid 5*l.* for the privilege of appealing at his own expense on the terms that he got 20 per cent. of the proceeds of the appeal. The trustee evidently did not think much of the chances of success. But having appealed, Mr. Kennedy did not then proceed with his appeal. Instead, on September 9, 1925, he issued a third writ, *Mackenzie-Kennedy* v. *Air Council* (1925, M. 2796).

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The writ claimed several matters which were dropped in the statement of claim. The claim delivered on December 16, 1925, alleges agreed confidence and secrecy in respect of the reports and drawings for his aeroplane before and after 1915, and detinue of these documents, and conversion of them to the defendants' own use, and also conspiracy with Handley Page for the purposes of such conversion.

When the application to strike out this statement of claim first came before the Court of Appeal it was pointed out that Lawrence J. having decided the facts necessary to deal with these questions, the plaintiff had not brought on the appeal against his decision, and this appeal was ordered to come on with the hearing of the original summons. On the hearing of the final appeal this Court took the view that the claims in contract could all be raised only by petition of right, and not by action against the Air Council, the same view as that taken by Russell J., and, this being sufficient to dismiss the appeal, did not hear it any further except in regard to the patent claim, which they also dismissed.

The question now is whether the Court, in the exercise of its inherent jurisdiction, should allow an action to proceed, when the plaintiff has failed in a previous action against the same party to establish any of the facts which he would need to establish his claims in tort; and has at present a final judgment of Lawrence J. against him on those facts; and when he did not raise, as he could have done in that action, any of the claims in tort he now desires to raise, though he took nine days in failing to prove the facts necessary to support these claims. In my view the cases of *Reichel* v. *Magrath* (1); *Macdougall* v. *Knight* (2); and *Stephenson* v. *Garnett* (3) establish that the Court has inherent jurisdiction to strike out as frivolous or vexatious a claim or defence, which has either been already decided in previous proceedings, against the party raising it, or might have been raised in a previous proceeding in which the facts necessary to raise it have been decided against the person who now

(1) (1889) 14 App. Cas. 665.
(2) (1890) 25 Q. B. D. 1.
(3) [1898] 1 Q. B. 677.

desires to raise them. In the present case the facts or legal incidents necessary to raise a case of conversion of documents, or breach of secrecy with regard to them, or conspiracy with Handley Page, have all been decided against Mr. Kennedy by Lawrence J. in the previous action, in which he might have raised the allegations of tort which he now bases on the same alleged facts. I think the Court should prevent his doing so again by striking out the writ and claim. In any event, I should have been of opinion that all matters before January 3, 1918, must be excluded from the statement of claim, as I cannot think that any liabilities in tort of individual members of the Air Board were transferred by statute to the Air Council. Further, in view of the line of decision in *Raleigh* v. *Goschen* (1), that the head of a Department is not liable for torts committed by his subordinates in the execution of his orders, but only for individual torts committed by himself, I have great difficulty in seeing how the Air Council can be sued for conspiracy or conversion, as distinguished from an action against any individual members of the body who themselves conspire or convert. I am disposed to think, though I do not finally decide it, that the appeal should also be dismissed on the grounds stated by Bankes L.J., and in more detail by Atkin L.J.

I allow this appeal, however, on the ground that as the facts necessary to support the action have been already decided by Lawrence J. against the plaintiff in an action in which the plaintiff could have raised the legal claims he now seeks to base on those alleged facts, the Court has an inherent jurisdiction to dismiss the action as frivolous and vexatious. The appeal should be allowed, and an order made to the above effect.

ATKIN L.J. This is an action brought by Mr. Kennedy against the Air Council. The indorsement on the writ appears to be consistent with the action being founded both on contract and tort. The statement of claim, however, confines the claim to remedies for tort. The summons by the appellants, the defendants in the action, seeks to strike out the statement of claim, and, further, or alternatively, dismiss the action on the ground that it discloses no cause of action, or is frivolous and vexatious. The first ground is based on the contention that the Air Council cannot be sued for a tort; the second on the contention that the issues sought to be raised by the plaintiff have already been determined against him by the judgment of Lawrence J. in an action brought in the Chancery Division by the plaintiff against the Air Council; and that the matters are therefore either res judicatae or such that it is vexatious and oppressive for the plaintiff to seek to litigate them over again. On the latter point I need only say that Mr. Kennedy brought an appeal against the judgment of Lawrence J. to this Court, and we dismissed it upon the point taken by the defendants below and approved by the judge, that the action was founded upon an implied contract, to which the defendants never became parties. It therefore became unnecessary to consider the other points decided against the plaintiff by Lawrence J., and we expressed no opinion upon them. In these circumstances it seems to me that we are not warranted in dismissing this action either as res judicata or as being frivolous and vexatious without a discussion of the very points which the plaintiff by his notice of appeal desired to review and we decided not to consider. I therefore propose to deal in this appeal solely with the question whether the action as framed in tort will lie against the Air Council. I am of opinion that it will not. Unfortunately Mr. Kennedy, who appeared in person, was naturally unable to offer us much assistance on the point of law, and I come to my conclusion with some anxiety lest some matter of importance may have been overlooked.

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(1) [1898] 1 Ch. 73.

The Air Council was constituted by the Air Force (Constitution) Act, 1917, which by s. 8, sub-s. 3, provides that an Air Council should be established consisting of one of His Majesty's Principal Secretaries of State and of other members to be appointed in such manner as His Majesty by Order in Council should direct. It provided by s. 10

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that the Air Council might sue and be sued, and might for all purposes be described, by that name, and that it should have an official seal which should be judicially noticed. It further provided by s. 8, sub-s. 3, that on its establishment the Air Board constituted under the New Ministries and Secretaries Act, 1916, should cease to exist, and all the powers, duties, rights, liabilities and property of that Board should be transferred to the Air Council. Incidentally it may be observed that the provisions of s. 10, sub-s. 3, of the Act of 1916 may by this clause be held to be applicable to the Air Council. That sub-section provided that the expenses of each of the Ministries established under the Act to an amount sanctioned by the Treasury should be paid out of moneys provided by Parliament. The Air Force (Constitution) Act, by s. 8, sub-s. 4, further provides for a transfer by Order in Council to the Air Council or the President of the Air Council of property, rights and liabilities of the Admiralty, Army Council or Secretary of State for War. Such transfers have been made by Order in Council, the most important for the present purpose being that of April 27, 1918 (St. R. & O., 1918, No. 538).

Can then the Air Council so constituted be sued in tort? Unless the Air Council is by its constitution created a corporation I think the answer must clearly be in the negative. If it be a corporation, the liability to be sued is in my opinion a more difficult problem, to which I will revert. But, unless incorporated, the Air Council is but a name for several important officials, who have administrative duties assigned to them on behalf of the Crown. It is clearly established that no proceedings to enforce a remedy for tort will lie against the Crown, or against any servant of the Crown as representing in the proceeding the Crown unless the Crown consents to such a proceeding. The Crown itself can do no wrong, and the public revenues cannot be made liable without the Crown's consent to remedy wrongs committed by servants of the Crown. I think that this is the effect of the decision in *Raleigh* v. *Goschen* (1), where it was held

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(1) [1898] 1 Ch. 73.

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that the Lords Commissioners of the Admiralty could not be sued in tort, though they were named individually, where they were described collectively by their official title in a case where Romer J. came to the conclusion that they were sued in their official capacity. I think that perhaps it might be more accurate to distinguish between a suit against a person in his individual capacity and in a representative capacity, for I cannot see that if you are in fact suing an individual on his personal liability it makes any difference whether you describe him as an official or not. If, however, you sue him as representing some interest or assets other than his own which you seek to bind by the action, it becomes very relevant how you describe him, for it may be found that as a representative he is not liable at all. And this is clearly true of a representative of the Crown who as such cannot be sued in tort. It is, of course, equally clear that individual servants of the Crown who themselves commit torts cannot escape liability by pleading the commands expressed or implied of the Crown. But sued as individuals they expose their own assets alone to liability in the event of judgment against them. Applying these considerations to this action it appears clear that unless the Air Council is incorporated the name is but a name for the individuals that compose it. I do not think that it can be used at all as the equivalent of the names of its members in a suit which is directed against the members in their private capacity. In any event in this case I think it is plain, plainer even than in the case of *Raleigh* v. *Goschen* (1), where at least the Lords Commissioners were individually named, that this present action is directed against the members of the Air Council in their official or, as I prefer to say, representative capacity as servants of the Crown, and therefore will not lie. If, however, the Air Council were incorporated different considerations might apply. The Crown may and does employ as its servant or servants, an individual, a joint committee or board of individuals, or a corporation. None can be made liable in a representative capacity for tort;

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(1) [1898] 1 Ch. 73.

the individuals may be made liable in their private capacity, and I see no reason why this liability should not extend to the juristic person, the corporation, as well as to the individual. It may be true that the corporation in such a case will have no private assets available to meet execution, but that may also be true of the individual. One must also face the difficulty that such a corporation will have no servants, for as in the case of individual officials, those who serve under it are not its servants, but servants of the Crown. It is, therefore, only for torts actually committed by it, or to which it is directly privy, as by giving orders for their performance, that it can be made liable. But for such a tort proved, for example, by a minute of an incorporated board expressly commanding the commission of a tort, in principle, as it appears to me, an action would lie, however unprofitable such an action would be. If the action were to be attacked at all it would have to be on the ground that such a futile proceeding was vexatious and oppressive. I think, therefore, that the decision of *Roper* v. *Public Works Commissioners* (1) could only be supported on the view that the action there was against the Commissioners (who are incorporated) in a representative capacity. The further objection that any tort would be ultra vires the corporation is of quite a different character, and must depend on the duties of the corporation and the circumstances of the particular act complained of. I do not think that the doctrine of ultra vires would be of universal application to every tort, or that it would be to the Crown's advantage that it should. The case of *Bainbridge* v. *Postmaster-General* (2) seems to depend entirely upon the fact that the Post Office servants, for whose negligence the Postmaster-General (a corporation) was sought to be held liable, are servants not of the Postmaster-General but of the Crown.

I have therefore felt it necessary to consider whether it could be contended in this case that the Air Council was a corporation. "To create a corporation by charter or Act of Parliament it is not necessary that any particular

(1) [1915] 1 K. B. 45.

(2) [1906] 1 K. B. 178.

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form of words be used. It is sufficient if the intent to incorporate be evident": per Littledale J. in *Tone River Conservators* v. *Ash.* (1) The learned judge goes on to consider whether in the case of the Conservators they have a name, perpetual succession, and a right to sue and be sued in their corporate name. It must be admitted that most, if not all, of these characteristics of a corporation attach to the Air Council. They have a name in which they can sue and be sued, and it would appear that they are to have perpetual succession, for by the Act of 1917, s. 8, sub-s. 3, the property of the Air Board is to be transferred to them, and by s. 8, sub-s. 4, it is contemplated that the property of the Admiralty or Secretary of State for War may be transferred to them by Order in Council. I find, however, that in fact under the Order in Council the property of the Secretary of State for War, and such property as the Air Council may acquire under the powers transferred to them, is vested not in the Air Council but in the President. I also bear in mind that there were in existence before 1917 various Acts expressly constituting Departments of State corporations. I need only refer to the Acts incorporating for certain purposes the Secretary of State in Council of India (Government of India Act, 1858, s. 65); the Postmaster-General (Post Office Duties Act, 1840, s. 67); and the Commissioners of Public Works (Commissioners of Works Act, 1892, s. 1). If it had been intended to incorporate the Air Council one would have expected the well known precedents to be followed with express words of incorporation, and express definition of the purposes for which the department was incorporated.

In these circumstances I am unable as at present advised to find in the words of the Legislature "the manifest intention to incorporate" which Littledale J. in the case cited rightly thought essential. I should, however, deem myself free to reconsider this opinion if hereafter in a case between different parties further assistance were afforded to the Court than could be given by the respondent in the present case. In any event I am also at present inclined to the

(1) (1829) 10 B. & C. 349, 384.

view that the Air Council, if a corporation, are being sued in a representative capacity which, as I have said, is impossible, but as that defect could be cured by amendment, upon which we have not heard Mr. Kennedy, I do not decide on that ground.

For the reasons given I am of opinion that the decision of the learned Master in this case was correct, and that the appeal should be allowed, and that the action should be dismissed.

Appeal allowed.

Solicitor for appellants: *Treasury Solicitor.*

J. S. H.

PATRICK *v.* RUSSO-BRITISH GRAIN EXPORT COMPANY, LIMITED.

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July 12, 13, 29.

Sale of Goods—Contract—Breach—Purchase for Resale—Loss of Profit on Resale—Measure of Damages.

The buyers, merchants, bought Russian wheat of a certain description for delivery on a named date, and before that date resold the wheat to a third party at a profit. The sellers failed to deliver. On that date and subsequently there was no market for Russian wheat of the said description. At the time of sale the sellers knew that the buyers were buying for resale:—

Held, that the buyers were entitled as damages to the difference between the contract price and the resale price.

AWARD in the form of a special case stated by arbitrators under s. 7 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

By a contract in writing dated October 15, 1926, between Patrick & Co. (herein called "the buyers") and the Russo-British Grain Export Co., Ld. (herein called "the sellers") the sellers agreed to sell and the buyers agreed to buy 2000 tons of Russian wheat as per sealed sample, November shipment, at 56*s.* 9*d.* per 480 lbs., notice of appropriation to be given within ten days of the date of the bill of lading. By a contract dated October 23, 1926, the buyers sold a similar parcel of 2000 tons of Russian wheat to Joseph Rank, Ld., on identical terms, except as to price, which was 60*s.* 6*d.* per 480 lbs. The last day for shipping the wheat under both these contracts was November 30, 1926, and the last day on which the sellers could give notice of appropriation was December 10, 1926. On that day the buyers wrote to the sellers asking to be advised as to the name of the ship on which the wheat was loaded. On December 13 the sellers replied that they were unable to fulfil the contract. The buyers thereupon claimed from the sellers the difference between the price at which they had purchased and that at which they had sold to Joseph Rank, Ld. The sellers repudiated liability, whereupon the dispute went to arbitration under the terms of the contract.

The arbitrators found: (1.) that at the time of the contract of October 15, 1926, it was in the contemplation of both parties that the wheat would probably be resold by the buyers, who were merchants, not millers. (2.) That on and after the date of the breach by the sellers it was impossible for the buyers to obtain 2000 tons of Russian wheat, or of Russian wheat approximately conforming to the said sample, November shipment. The value of the contract wheat at the time of the breach was 54*s.* per 480 lbs., and of No. 1 Manitoba wheat, November shipment, 59*s.*

The arbitrators made three alternative awards based:—

(*a*) On the difference between the contract price and the price at which the buyers had resold to Joseph Rank, Ld.—namely, 1715*l.*

(*b*) On the difference between the contract price and the market value of Russian wheat, November shipment, on December 10, 1926, the date of the breach—namely, one shilling, nominal damages, and

(*c*) On the difference between the contract price and the value of wheat other than Russian wheat at the date of the breach—namely, 1030*l.*

Jowitt K.C. and *James Dickinson* for the buyers.

Somervell for the sellers.

[The following cases, in addition to those referred to in the judgment, were cited during the argument: *Borries* v.

Hutchinson (1); *Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel* v. *Armstrong* (2); *Hinde* v. *Liddell* (3); *Hydraulic Engineering Co.* v. *McHaffie, Goslett & Co.* (4); *Rodocanachi, Sons & Co.* v. *Milburn Brothers* (5); *Kasler & Cohen* v. *Slavouski* (6); *Hall* v. *Pim (Junior) & Co., Ld.* (7); *Wertheim* v. *Chicoutimi Pulp Co.* (8); and *British Westinghouse Co.* v. *Underground Electric Railways.* (9)]

Cur. adv. vult.

1927. July 29. Salter J. read the following judgment: This is a case stated by arbitrators under s. 7 of the Arbitration Act, 1889, and raises the question whether, in the circumstances stated, buyers of goods are entitled to claim loss of profit on resale as damages for non-delivery.

The material facts can be stated very briefly: (1.) On October 15, 1926, the sellers sold to the buyers 2000 tons of Russian wheat as per sample, November shipment, at 56*s.* 9*d.*, notice of appropriation to be given within ten days from date of bill of lading. (2.) When the contract was made it was in the contemplation of both parties that the wheat would probably be resold by the buyers, who are merchants. (3.) On October 23, 1926, the buyers resold a similar parcel of 2000 tons of Russian wheat on identical terms, except as to price, which was 60*s.* 6*d.* (4.) The last day for giving notice of appropriation was December 10. On that day the sellers informed the buyers that it was impossible for them to perform the contract and no appropriation or delivery was ever made. (5.) On and after the date of the breach by the sellers it was impossible for the buyers to obtain 2000 tons of Russian wheat, November shipment, conforming or approximately conforming to the sample. (6.) The value of the contract wheat at the date of the breach was 54*s.* (7.) The value, at the date of the

(1) (1865) 18 C. B. (N. S.) 445.
(2) (1874) L. R. 9 Q. B. 473.
(3) (1875) L. R. 10 Q. B. 265.
(4) (1878) 4 Q. B. D. 670.
(5) (1886) 18 Q. B. D. 67, 76.
(6) [1927] W. N. 201.
(7) (1927) 32 Com. Cas. 144.
(8) [1911] A. C. 301, 307.
(9) [1912] A. C. 673, 688.

breach, of No. 1 Northern Manitoba wheat, November shipment, was 59*s*.

On these facts the arbitrators have made three awards, the first based on the difference between contract price and resale price, the second on the difference between contract price and value of the contract wheat at the date of the breach, and the third on the difference between contract price and the value of American wheat at the date of the breach. I have to determine which of these is the correct measure of the damages.

Where a seller of goods fails to deliver, he should pay to the buyer the value of the goods at the time when they should have been delivered. This is the normal measure of damages. It is the measure prescribed by the first branch of the rule in *Hadley* v. *Baxendale* (1), and enacted in s. 51 of the Sale of Goods Act, 1893. If at the date of the breach there is an open market for goods of that kind, then the market price is obviously the value to the buyer. If there is no market the value must be otherwise ascertained, and a resale price may be some evidence of such value. But it is clear that loss of profit on resale can never be recovered unless the buyer can bring himself within the second branch of the rule and can show special circumstances and a right to special damages such as is reserved by s. 54 of the Sale of Goods Act, 1893.

The decisions which have explained and illustrated the second branch of the rule in *Hadley* v. *Baxendale* (1) show that the application of this part of the rule to the facts of a particular case involves the consideration of two questions, one of fact and one of law. The first question is, what did the parties forecast as the probable course of events in relation to the contract when it was made? The second question, a question of law, is this—What may the Court reasonably suppose to have been in the contemplation of the parties as a probable result of the breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach? see *Hammond & Co.* v. *Bussey*. (2)

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(1) (1854) 9 Ex. 341; 2 Sm. L. C. (12th ed.) 534.

(2) (1887) 20 Q. B. D. 79.

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Salter J.

To deal first with the question of fact. The finding of the arbitrators is: "It was common knowledge at the time this contract of October 15 was entered into that the buyers were not millers but merchants, and it was at that time in the contemplation of the sellers or their agents and of the buyers that the wheat would probably be resold by the buyers." It has often been contended that a buyer can never recover loss of profit on resale as damages for non-delivery unless he can show a contract of indemnity. Where a contract contains a term that the promisor, if he shall not perform some term of the contract, shall pay a sum ascertained by the contract or ascertainable under its terms, and the promisee claims payment accordingly, the promisor is not called on to make compensation for breaking the contract, he is called on to perform it. The statement of the rule in *Hadley* v. *Baxendale* (1) is followed immediately by this passage, which is essential to a proper understanding of the rule: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them." These words seem to me to relate to the assessment of compensation for breach of a contract and to be inappropriate to an action for money due under a contract. On the other hand a bare notice is not enough. The buyer must satisfy the Court that the seller understood that in the event of resale at a profit, he would be called on to pay loss of profit on resale in the event of non-delivery and was content to take the risk: see *British Columbia Sawmill Co.* v. *Nettleship* (1); *Horne* v. *Midland Ry. Co.* (2); and *Grébert-Borgnis* v. *Nugent.* (3) The arbitrators find that both parties contemplated that the buyers would probably resell. I think I must take this as meaning that they would probably resell at a profit. *Hammond* v. *Bussey* (4) is authority for holding that it is not necessary, in order to entitle the buyer to recover loss of profit on resale, that the seller should have known, when he sold, that the buyer was buying to implement a contract already made, or that the buyer would certainly resell; it is enough if both parties contemplate that the buyer will probably resell and the seller is content to take the risk. I think, therefore, that the arbitrators' finding is sufficient to support a claim for loss of profit on resale. It might well have been insufficient to support a claim for costs incurred in litigation with a sub-buyer or for penalties or damages paid to him.

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(1) 9 Ex. 341, 354; 2 Sm. L. C. (12th ed.) 534, 545.

As regards the second question, it is thus stated by Fry L.J. in *Hammond* v. *Bussey* (5): "Having thus ascertained the special circumstances under which the contract was made, and the knowledge of the parties with regard to them, we come to the last question—namely, what may the Court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?" I think this means, what may the Court suppose to have been contemplated by the parties as the probable result of the breach which actually occurred, in the circumstances in which it occurred, assuming them to have applied their minds to the contingency of such a breach? If so, the question in this case is: Considering that the parties contemplated a probable resale by the buyers at a profit, what would they have contemplated as the probable result if they had applied their minds to the contingency of a resale at a profit and a failure to deliver at a time when goods of the contract description and quality were unobtainable? The answer must be that the buyer would lose his profit on resale: he may lose more, but he must at least lose that.

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(1) (1868) L. R. 3 C. P. 499, 509.
(2) (1872) L. R. 7 C. P. 583, 591.
(3) (1885) 15 Q. B. D. 85, 89, 90, 93.
(4) 20 Q. B. D. 79.
(5) 20 Q. B. D. 100.

If there is a market available to the buyer no question of loss of profit on resale can arise. There are two classes of cases in which loss of profit has been claimed, although there is a market, on the ground that the market is not available to the buyer. One is when the sale is of specific goods, and the buyer has resold the same goods. The other is where the contract of resale has the same delivery date as the contract of sale. Here, it is not necessary to consider either class, since there was no market at all.

In *Grébert-Borgnis* v. *Nugent* (1) the buyer informed the seller that he was buying for the purpose of a contract which he had made, or was making, with a French customer. There was late delivery and no market, with the result that the buyer lost his profit and had to pay damages to his French customer. The buyer's right to recover his loss of profit was admitted in the Court of Appeal. It is difficult to see on what principle the present is to be distinguished from that case, since the judgments in *Hammond* v. *Bussey* (2) show that the right to recover loss of profit may exist when the resale is contemplated by both parties as a thing that will probably occur in the ordinary course of business. In *Lyon* v. *Fuchs* (3) the seller knew that the buyer was buying for resale. The buyer did resell at a profit. That was breach by non-delivery and no market. The buyer recovered loss of profit on resale. In *Frank Mott* v. *Muller* (4) the facts were in substance the same and loss of profit on resale was recovered. *Hall* v. *Pim* (5) was a sale and resale of specific goods, and breach by non-delivery. Rowlatt J. held, on the construction of the contract of sale, that the parties contemplated a resale by the buyer, and a resale on identical terms except price, and allowed loss of profit. The Court of Appeal (1) differed from Rowlatt J. on the construction of the contract and were not satisfied that the parties contemplated a resale by the buyer, but there is nothing to suggest that they differed from the view that loss of profit would have been recoverable if there had been such contemplation. Mr. Somervell for the sellers relied particularly on *Williams* v. *Reynolds* (2), and the facts there were very similar to those in the present case. Cotton was sold to be delivered in August. The buyers resold at a profit the same quantity and quality of cotton to be delivered in August. The result was that when the seller made default on the last day of August, it was too late for the buyer to go to the market and obtain goods to satisfy his sub-buyer. In support of a claim for loss of profit counsel urged that the buyers were not bound to get cotton for their sub-buyers before the end of August. On this Blackburn J. observed (3): "A prudent purchaser, relying on this contract, would, in making a contract with his vendees, have taken a margin of a week." In giving judgment the same learned judge said (4): "Though the purchaser might naturally rely on the seller's contract to enable him to fulfil his own, it is not necessary that he should do so; and if the seller was a slippery customer it would be imprudent to do it: in that case the purchaser would, as a prudent man, go into the market and supply himself from thence. Here the plaintiff had reason to rely on the defendants, but that does not entitle him to throw upon them the loss of the profit he would have made." In short, the Court, though satisfied that the parties contemplated resale by the buyer, were not satisfied that they contemplated a resale on such terms that if the seller made default the buyer must be unable to satisfy his sub-buyer. It was a case in which the parties contemplated that in the

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(1) 15 Q. B. D. 85.
(2) 20 Q. B. D. 79.
(3) (1920) 2 Ll. L. Rep. 333.
(4) (1922) 13 Ll. L. Rep. 492.
(5) (1926) 32 Com. Cas. 46.

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(1) 32 Com. Cas. 144.

(2) (1865) 6 B. & S. 495.

(3) (1865) 6 B. & S. 497.

(4) Ibid. 505.

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event of non-delivery the buyer would buy against the seller, and only nominal damages were recoverable.

In my opinion, loss of profit on resale is recoverable in the circumstances of this case. The first award is therefore right, and there must be judgment accordingly.

Judgment accordingly.

Solicitors for buyers: *Richards & Butler.*

Solicitors for sellers: *Coward, Chance & Co.*

W. L. L. B.

MESSAGER v. BRITISH BROADCASTING COMPANY, LIMITED.

1927
June 28, 29;
July 29.

Copyright—Opera—Broadcasting—" Perform . . . . in public "—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2*—Theatrical Producer—Contract—Assignability.*

To broadcast an opera by wireless telephony is to " perform " it " in public " within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911.

The plaintiff granted a licence to a well known theatrical producer to represent or perform his opera :—

Held, that the licence was personal to the parties, and could not, therefore, be assigned.

ACTION tried by McCardie J.

The plaintiff, M. André Messager, claimed an injunction to restrain the defendants, the British Broadcasting Company, Ld., from infringing his copyright in his opera, " The Little Michus," and damages. The opera was produced at Daly's Theatre, London, under a contract dated March 23, 1905, between the plaintiff, the composer, and the authors of the play and Mr. George Edwardes, whereby the latter was granted the sole and exclusive right of performing the opera in the United Kingdom, America and the British Empire. In October, 1926, George Edwardes (Daly's Theatre), Ld., in whom, it was contended, Mr. Edwardes' rights in the opera had become vested on his death, licensed the defendants to perform the play, which they then broadcasted in the usual manner. The plaintiff denied that Mr. Edwardes had acquired the broadcasting rights under the above contract of March 23, 1905. The terms of the contract and the other relevant facts and the contentions of counsel are fully set out in the judgment.

The *Hon. S. O. Henn Collins*, *A. J. Duhamel* and *K. E. Shelley* for the plaintiff.

Sir Duncan Kerly K.C. and *Trevor Watson* for the defendants.

Cur. adv. vult.

1927. July 29. McCARDIE J. read the following judgment: This case raises points of novelty and importance on the intricate subject of copyright law. The plaintiff, M. Messager, is a French subject and a distinguished musician. He is the composer of the well known comic opera called "The Little Michus," which was successfully produced at Daly's Theatre in London in the year 1905. He alleges that the defendants, the British Broadcasting Company, infringed his musical copyright in that opera by a wireless performance given by them in November, 1926. Hence his claim for damages. I desire to state at once that the points involved in this action carry no reflection whatever on the good faith or honour of the defendant corporation.

The history of the matter lies within a narrow compass of facts. By a written agreement dated March 23, 1905, the plaintiff and others granted certain rights in the opera "The Little Michus" to Mr. George Edwardes, the well known theatrical producer and director. Several vital points in the case turn on the wording of that agreement. I, therefore, set it out in full, for it is not of great length.

"Memorandum of Agreement made this 23rd day of March, 1905, between André Messager, Albert Vanloo, and Georges Duval, all of Paris (hereinafter called 'the licensors'), of the one part, and George Edwardes, of Daly's Theatre, London (hereinafter called 'the licensee'), of the other part. Whereas the said André Messager is composer and the said Albert Vanloo and Georges Duval are the authors of the comic opera in three acts entitled 'Les Petites Michus' (hereinafter called 'the play,' which expression shall comprise both words and music), and Whereas the licensors have delivered the play to the licensee together with the full score of the music thereof with a view to its being produced by the licensee at Daly's Theatre and elsewhere on the terms hereinafter mentioned. Now it is hereby agreed as follows :—

1. The licensors hereby grant the licensee the sole and exclusive right of representing or performing the play in the United Kingdom of Great Britain and Ireland, America, and the British Colonies and Dominions.

2. The copyright in the music of the play shall remain the property of the said André Messager, and he shall be at liberty to use the English lyrics for sale with the music.

3. The play shall be adapted for the English stage at the expense of the licensee.

4. The licensee shall in consideration of the rights hereby granted pay to the licensors the following royalties or fees :—(*a*) Four per cent. of the gross receipts up to 800*l.* and 6 per cent. of the gross receipts over that amount for London and New York, and half of these amounts for all other towns, with the exception of No. 3, or fit-up, towns, the fees of which are to be one-fourth of London and New York, such fees, in the case of the United Kingdom of Great Britain and Ireland, to be paid weekly, and, in respect of America and the British Colonies and Dominions, monthly.

5. If the play be not produced in London by the said George Edwardes within three months from this date all rights of representation as aforesaid shall revert to and become again the absolute property of the licensors.

6. The licensee agrees not to interpolate into the score any piece or number not composed by the said André Messager without the said André Messager's permission, but the said André Messager agrees to furnish and compose such alterations and additional numbers required for the English version as the said George Edwardes may reasonably require.

7. The said André Messager shall assist at such rehearsals as may be agreed and shall conduct the orchestra on the

occasion of the first production of the play at Daly's Theatre aforesaid.

8. Proper books showing the gross receipts of the theatre or theatres at which the said play shall be represented shall be kept by the licensee, and the licensors or their agent duly authorized in writing shall be entitled at all reasonable times to inspect the said books and all vouchers, accounts, and other documents relating to the said receipts so as to enable the licensors to verify the amount of percentage payable to them as aforesaid."

Such was the agreement under which Mr. Edwardes produced the opera in 1905. I assume that clause 2 refers only to the rights of printing and publishing the music for sale. Mr. Edwardes died in 1915, leaving a will. In May, 1920, his executors assigned in writing to a limited company called George Edwardes (Daly's Theatre), Ld., "so far as they lawfully could," the benefit of the contracts referred to in the schedules to the deed and the benefit of "all other copyrights, rights of representation, licences, and the rights (if any) to which the vendors were entitled in connection with the business of the deceased." In the schedule appeared the following: "No. 13, 'The Little Michus,'" and other details which I need not now read. In October, 1926, the defendants negotiated with George Edwardes (Daly's Theatre), Ld., for the right to give a broadcast performance of "The Little Michus" and, by letters passing between that company and the defendants, George Edwardes (Daly's Theatre), Ld., agreed to permit a wireless performance by the defendants for 60*l.* The defendants paid the 60*l.* to that company. No step was taken to inform the plaintiff of the intended performance. His assent was never obtained. Pursuant to the permission of George Edwardes (Daly's Theatre), Ld., the defendants gave a broadcast performance of substantially the whole opera on November 10, 1926. This is the alleged infringement.

I will now take in order the points of law which arise, and with respect to each I will state any further facts which may call for mention. The first question is raised by para. 4 of the defence, which reads as follows: "The defendants admit that on November 10, 1926, they caused to be performed at their studio at Savoy Hill the music of the comic opera entitled 'Les Petites Michus,' and that the said performance was transmitted by wireless telephony. Such performance was not public within the meaning of the Copyright Act, 1911." This contention raises a question of complete novelty which rests upon the words of the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46). The material words of s. 1 are these in sub-s. 2: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public." If, therefore, the defendants did not on November 10, 1926, give a performance in public, this action fails at once. Now, whether a performance is in public or not must, in my view, depend on the particular circumstances of each case. A purely domestic or private performance will not, as a rule, amount to an infringement of copyright: *Duck* v. *Bates*. (1) On the other hand, a performance given in a dancing or social club may upon the facts be "public" within the Copyright Act, 1911, although no charge for admission be made. It must be remembered that members together with their guests may constitute a body of persons who would otherwise pay to hear a performance of the piece at a theatre, concert hall, or the like place of entertainment: see *Harms* (*Incorporated*), *Ld.* v. *Martans Club, Ld.* (2) To hold otherwise would deprive an author or composer of the protection that he may justly claim. Now so far as I am aware no decision has yet been given within the United Kingdom as to broadcasting by wireless telephony. By s. 35, sub-s. 1, of the Copyright Act, 1911, "performance" is defined as meaning "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument." Although wireless telephony may not be wholly "mechanical"

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(1) (1884) 13 Q. B. D. 843.
(2) [1927] 1 Ch. 526.

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in the narrow sense of that word, yet I think that the Copyright Act extends to that which, though perhaps not definitely in the contemplation of those who framed the Act, yet falls substantially within the wide and embracing words employed in the defining clauses. The principle indicated in *Gambart* v. *Ball* (1) is of assistance. I need not set out the facts in that case, which turns upon the words of early statutes for the protection of artists and engravers. In the course of his judgment (2) Erle C.J. said: "I see no reason why these very wide and general words should not be construed according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time and to such other modes of multiplying copies as the ingenuity of man may from time to time discover." It is, I think, reasonably clear that a person who gives to a public audience a performance made audible and effective to them by means of a receiving instrument in the place where that public is assembled together may be liable for infringement of copyright. In the case now before me, however, the actual performance of "The Little Michus" was given in the defendants' private studio at Savoy Hill, London, by the orchestra and performers engaged by the defendants. The public were not admitted to the studio. Officials and a few friends only were present apart from those who rendered the opera. It was by means of electrical instruments that the defendants, by modulating the waves in the ether, were able to affect, as they intended to affect, a vast number of electrical instruments possessed by members of the public and thereby to render audible to that public the performance given within the walls of the defendants' studio. In my view, however, the defendants, in doing what they did, clearly gave a public performance. Instead of gathering the public into a vast assembly room, they set in motion certain ether waves knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter and also the object and intent of the Copyright Act. I have no doubt that the defendants gave a public performance within the principle of *Harms* (*Incorporated*), *Ld.* v. *Martans Club*, *Ld.* (1) In Australia, I find, it has been expressly held that broadcasting constitutes an infringement of copyright: see *Chappell & Co., Ld.* v. *Associated Radio Co. of Australia, Ld.* (2) The same view has been taken in the United States of America, where the Court, in dealing with the matter, justly said: " Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance ": *Remick & Co.* v. *American Automobile Accessories Co.* (3) I am satisfied that the correct view of the matter has been presented by the learned author of Copinger on Copyright, 6th ed., pp. 153–155. I agree with his lucid observations.

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(1) (1863) 14 C. B. (N. S.) 306.

(2) 14 C. B. (N. S.) 317.

Holding then as I do that the defendants gave a public performance on November 10, 1926, I am, therefore, obliged to consider the second group of questions raised in this action. I need not formulate at length the respective contentions of the parties or analyse in detail the able arguments of counsel on both sides. I can summarize the points at issue in a few words. Briefly put, then, the defendants contended in substance that the plaintiff, by the agreement of March, 1905, had completely assigned all his performing rights in " The Little Michus " to Mr. George Edwardes with respect to the areas mentioned, that this assignment was free of all limitation, that it left Mr. Edwardes at liberty to assign or license as he wished, and that the plaintiff was, therefore, unable to sue in this action for the alleged infringement of copyright by the defendants. Exactly the opposite contentions were raised by Mr. Collins for the plaintiff. In substance he submitted that Mr. Edwardes had only obtained a licence of a limited and not assignable character.

(1) [1927] 1 Ch. 526.

(2) [1925] V. L. R. 350.

(3) (1925) 5 Fed. Rep. (2nd series) 411, 412.

Before I deal with the contentions it is necessary to mention three points. First, that no question arises here upon the fact that the plaintiff is a French subject. The points dealt with in *Falcon* v. *Famous Players Film Co.* (1) were not again argued: see also s. 29 of the Copyright Act, 1911, and the Orders in Council made thereunder. Secondly, that the agreement between the parties was made six years before the Copyright Act, 1911, was passed. The rights possessed by the plaintiff before that enactment were conferred by the provisions of the Dramatic Copyright Act, 1833 (3 & 4 Will. 4, c. 15), and the Copyright Act, 1842 (5 & 6 Vict. c. 45): see Copinger on Copyright, 5th ed., pp. 12 and 14, and 6th ed., p. 17. By the operative effect of s. 24 of the Copyright Act, 1911, the plaintiff got the rights substituted by the First Schedule to that Act for such rights as he may have possessed immediately before the passing of the Act. So far as the plaintiff had not parted with them he still had the performing rights in "The Little Michus." Thirdly, that only the owner of copyright can sue for damages: see Copinger on Copyright, 6th ed., p. 166. But under s. 5, sub-s. 3, of the Act of 1911, however, an assignee under a partial assignment of copyright can sue.

Now, three main questions arise upon the agreement of 1905. The first is this: Was it an assignment or a licence? Such a question often gives rise to difficulty, and at the present time it is made none the less easy of solution by the singular breadth of s. 5, sub-s. 2, of the Copyright Act, 1911. It is important to remember once more, however, that the agreement now in question was made before and not after the passing of this Act. This should be borne in mind when consideration is given to the somewhat debatable decision of Lush J. in *British Actors Film Co., Ld.* v. *Glover* (2), where the agreement in question was made in 1917. Some of the tests which indicate the distinction between an assignment and a licence are mentioned in Copinger on Copyright, 6th ed., pp. 106, 107, 113, 114 and 307. The breadth of the agreement in *Falcon* v. *Famous Players Film Co.* (1) and *Barstow* v.

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(1) [1926] 2 K. B. 474.

(2) [1918] 1 K. B. 299.

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Terry (1) should be observed and should be contrasted with the terms of the document before me. Intention must be the ultimate test for deciding whether an agreement be an assignment or a licence, and intention is to be gathered from the document itself and the surrounding circumstances. In my view, the document before me is not an assignment but a licence. If made as an assignment nothing could have been easier than to say so. Throughout the document the words " licensors " and " licensee " are expressly used. There is no mention of the executors or the assigns of Mr. George Edwardes. Express duties are cast upon the licensor ; express obligations of a continuing nature are thrown upon him as to royalties and fees. There is no payment of a gross sum and there is no indication of a sale of rights : see per Fry J. in *Hole* v. *Bradbury*. (2) The whole wording of the agreement is framed on the lines of a licence in particular terms and not on the lines of an assignment. If the document in *Taylor* v. *Neville* (3) did not amount to an assignment, as was held by the Court of Appeal, still less is the document before me an assignment. I hold that the document before me is a licence only.

The second question is this : To what extent did the licence to Mr. George Edwardes go ? In my opinion, it was a strictly limited licence. It was confined to theatrical representations of the ordinary character at theatres and no other places. It gave no other rights to Mr. George Edwardes. Just as the agreement in *In re Jude's Musical Compositions* (4) was held by the Court of Appeal to give only " the sole and exclusive right of printing and publishing the compositions in question in a particular form " : see per Lord Alverstone citing *Lucas* v. *Cooke* (5), so here the agreement only gave to Mr. George Edwardes the right of performing " The Little Michus " at particular places—namely, theatres. Practically every clause of the agreement points to performances at a theatre and a theatre only. Clauses 4 and 8 point in the clearest manner to performances to be given at a theatre at

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(1) [1924] 2 Ch. 316.

(2) (1879) 12 Ch. D. 886, 895.

(3) (1878) 38 L. T. 50.

(4) [1907] 1 Ch. 651, 659.

(5) (1880) 13 Ch. D. 872.

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which proper books are kept, so as to enable the plaintiff to secure his just percentage of the box-office receipts. If, as the defendants contended, the document granted to Mr. Edwardes the right within the specified areas to perform "The Little Michus" as he wished and when he wished, and wholly or in part as he wished, then it would follow that he could perform any part of the opera in a public park, a seaside shelter, or any village concert hall, or even, if he pleased, by means of a street band or a negro troupe. This cannot be so, and I think that it is reasonably clear that all that was granted to Mr. Edwardes was the right to perform the opera as a play and at theatres under normal conditions and so as to fulfil the requirements in particular of clauses 4 and 8. It follows, therefore, that apart from the next point, Mr. George Edwardes, if living in November, 1926, would have had no right to authorize or license a wireless performance by the defendants.

Thirdly, there is, however, a third and still more serious question—namely, whether or not the agreement of March 23, 1905, ended with the death of Mr. George Edwardes in 1915. That the licence was irrevocable during the life of that gentleman, provided he observed the terms of the agreement, is, of course, clear: *Hurst* v. *Picture Theatres, Ld.* (1) The point in this last cited case is, of course, wholly distinct from the point now before me—namely, whether the agreement was personal to Mr. Edwardes or whether his rights under it were assignable. It is, of course, obvious that a contract by an artist to paint a picture, or by an author to write a book, is terminated by death: see the cases cited on such points in Leake on Contracts, 7th ed., pp. 874, 875. Contracts which import direct consideration of personal skill and confidence are not assignable, but end with death. This rule has been applied by the Courts in several directions. It has, for example, been held that an agreement by a publisher to publish a book is personal to him and cannot in the absence of express provision be assigned. Striking illustrations of this are to be found in *Stevens* v. *Benning* (2) and *Hole* v. *Bradbury* (3):

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(1) [1915] 1 K. B. 1.

(2) (1854) 1 K. & J. 168.

(3) 12 Ch. D. 886, 896, 897.

per Fry J. Still more striking is the decision of Stirling J. in *Griffith* v. *Tower Publishing Co., Ld.* (1), where he held that the principle of *Stevens* v. *Benning* (2) and *Hole* v. *Bradbury* (3), which established that a publishing agreement between author and publisher is personal to the individuals entering into it, and that the benefit of such an agreement is not assignable without the author's consent, applies equally to the case of a similar agreement between an author and a limited company of publishers. Stirling J. there says (4): "An author may have confidence in a limited company as well as in an individual publisher. A limited company may have a reputation for producing books in good style and attractive form." Such being the decisions, can I draw any sound distinction between the case of a publisher and the case of a theatrical producer? In my view no distinction exists. The work of the latter is even more personal than that of the former. It requires an even larger measure of personal experience and instinct, knowledge and skill. Personal qualifications and particular technical experience are essential for successful theatrical production. Mr. George Edwardes was a man of unusual gifts. He held a high and almost unique position in the world of theatrical production. His reputation was world-wide. I have no doubt that M. Messager relied, as he stated in his evidence, on the personal reputation, skill, and ability of Mr. George Edwardes when making his agreement with that gentleman in 1905. The wording of the agreement itself points clearly to the personal character of the respective obligations. There is, as I have already pointed out, no reference whatever to the executors or assigns of Mr. George Edwardes. The first production was to be by Mr. Edwardes alone: see clause 5. Under clause 6 the plaintiff was to furnish such additional numbers as Mr. Edwardes himself might require. The whole agreement is, I think, personal on both sides. That the agreement required the personal first production by Mr. Edwardes is, as I have said, clear, and I think that Mr. Collins is right in

(1) [1897] 1 Ch. 21.
(2) 1 K. & J. 168.
(3) 12 Ch. D. 886, 896, 897.
(4) [1897] 1 Ch. 24.

his submission that the agreement must be regarded as one and indivisible. I must, therefore, hold that this agreement, resting as it did upon obvious personal considerations, ended with the death of Mr. George Edwardes, and that the benefits of that agreement could not be assigned by the executors of that gentleman. It follows, therefore, that the purported transfer of the benefits of the agreement from the executors to George Edwardes (Daly's Theatre), Ld., in May, 1920, was of no effect, and that the executors were well advised in their cautious wording of the deed. It also follows, therefore, that George Edwardes (Daly's Theatre), Ld., had no power to grant a licence to the defendants in November, 1926, for a wireless performance of " The Little Michus."

In reaching the above conclusion I do not overlook the evidence of Mr. Paget for the defendants—namely, that licences such as that now in question have been generally regarded by the theatrical world as assignable. Nor do I overlook the passage on p. 131 of the recent and excellent treatise by Mr. Sidney Isaacs on " The Law of Theatres, Music Halls, and Cinemas." The distinction, however, must never be forgotten between licences which are independent of personal consideration and those which, as in the present case, directly involve such consideration. The case of *Taylor* v. *Neville* (1), so far as it touches the present point, must be deemed to turn on special facts and particular evidence, and must, moreover, always be weighed in the light of later decisions.

The result of what I have said is that the defendants gave their wireless performance in November, 1926, without lawful licence, and thereby infringed the performing rights in " The Little Michus," which were vested in the plaintiff. I need not, therefore, consider the most interesting further point submitted by Mr. Collins for the plaintiff—namely, that the defendants in any event committed an infringement by giving a public performance abroad by means of their wireless apparatus here acting in unison with the receiving instruments of persons on the Continent and thus outside the regions specified in the agreement of March, 1905.

(1) 38 L. T. 50.

There remains the question of damages. In such a case as the present the amount of damages is at large. The defendants, as I have said, acted in perfect good faith. Good faith, however, does not relieve them of liability to compensate the plaintiff. The injury done to a composer by a wireless performance will vary with the circumstances. If the whole of a current and popular opera be given by "wireless," much hurt may be inflicted, inasmuch as the curiosity and interest of many thousands of persons may be thereby diminished or satisfied. If a part only of a current and popular opera be given, then the wireless performance, if good, may awaken or stimulate the desire to see and hear the whole of the piece at the theatre where it is running. In the present case the presentation of "The Little Michus" at Daly's Theatre ceased more than twenty years ago, although it has from time to time been played at minor theatres in the suburbs or provinces. It is true that substantially the whole opera was given by the defendants and that it was heard by several million people, but I doubt, however, whether, apart from the point to which I next refer, the mere performance inflicted any real injury to the value of the plaintiff's performing rights. It was stated, however, by Mr. Boosey, a man of wide experience, in his evidence for the plaintiff, that the performance in November, 1926, by the defendants was not a good one. Substantially, he said that the defendants' performance had a damaging effect on the plaintiff's rights, because the conditions of the performance were such that the full musical value and quality of the plaintiff's work could not be presented to those who listened to the performance. He added that not only was the performance not good, but that the rehearsal had obviously been inadequate. In his view, moreover, the wireless performance by the defendants was the worst possible advertisement that a musical play could have. No evidence was led by the defendants in contradiction to that given by Mr. Boosey. I cannot, however, help feeling that Mr. Boosey does not favour wireless performances of music at all. I am bound to state for my own part that I regard broadcasting, taken as a whole, as an enormous and indeed incalculable advantage to the nation. I must weigh the evidence for myself, and I must not forget that those who heard "The Little Michus" in November, 1926, were aware of the disadvantages which may surround a wireless performance, and were also aware of the cast by which and the conditions under which the performance was given. Taking all the relevant considerations into mind, I have come to the conclusion that I should award the sum of 150*l.* as damages to the plaintiff. There must be judgment in the plaintiff's favour for 150*l.* damages, with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Gery & Brooks.*
Solicitors for defendants: *Steadman, Van Praagh & Gaylor.*

W. L. L. B.

1927
April 8;
July 8, 19.

WISBECH RURAL DISTRICT COUNCIL *v.* WARD.

[1926. W. 828.]

Building Contract—Architect—Interim Certificate given by Architect—Negligence of Architect—Whether Architect in Position of Quasi-Arbitrator—Liability of Architect.

The presumption is that an architect under a building contract when he gives an interim certificate is not acting as a quasi-arbitrator, but is merely acting as agent for the building owner, unless there is some clause in the building contract to contradict that presumption; and if the architect is guilty of negligence in giving such interim certificate he is liable to be sued by his principal for such negligence.

ACTION tried before Sankey J.

The plaintiffs, the Wisbech Rural District Council, sued the defendant, Mr. Frank Ward, to recover damages for negligence.

The following statement of facts is taken from the judgment:—

"Shortly after the conclusion of the war the plaintiffs proposed to erect a number of houses under a housing scheme, and for that purpose on September 30, 1920, they entered into a contract with a firm of builders.

"The defendant was employed by the plaintiffs as the architect under that contract.

"The Ministry of Health had rights in connection with the scheme by which they could compel the user of war material which the Disposals Board had for sale. The Ministry further had the right of revising the price and making allowances in the event of the prices of labour or material rising or falling during the continuance of the contract.

"The houses in the years 1920-1 were in course of erection, and the defendant gave twelve interim certificates, the first on November 29, 1920, and the last on November 24, 1921, in pursuance of clause 29, which regulated the method of payment."

Clause 29 provided as follows: "(1.) *Interim Payments.*—No money shall become due to the contractor unless and until the architect shall certify in writing the amount thereof and that the contractor is entitled thereto.

"(2.) When work to the value of 250*l.* has been executed and thereafter at monthly intervals the architect shall certify in writing to the contractor and the employers the amount from time to time payable to the contractor under this contract, and shall issue such monthly certificate not later than the 15th day of each month following that in which the first certificate is given, and the employer shall within fourteen days of the date of issue of the certificate pay to the contractor the sum so certified.

"(3.) The amount to be certified on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work, including authorised extras and day work executed and materials delivered on the site up to the first day of the month in which payment is made, and in preparing any certificate the architect shall take account of any alteration in rates of wages or price of materials which may by virtue of clause 25 hereof affect the amount payable to the contractor in respect of the works. The balance of 10 per cent. of the value of the work shall be retained until the sum so retained (hereinafter called 'the retention fund') amounts to 467*l*. 10*s*., after which the contractor shall be entitled to be paid monthly to the full value of all work executed and material supplied. One-half of the retention fund shall be paid (subject to the conditions set out herein) to the contractor at the completion or occupation of the works and the other half, together with any further sum found due to the contractor at the final adjustment of the accounts by the quantity surveyor, shall be paid four months after completion or occupation of the works, provided that all defects for which the contractor is liable are made good and that he has otherwise discharged his liabilities under the contract.

"(4.) The sums forming the retention fund shall be deposited by the employers as they accrue in a bank to be agreed between the parties in the name or names of the employers, and any interest on such sums shall be the property of the contractor, and shall be paid to him by the employers at the time of the final payment after completion.

"(5.) No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor to the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works."

"In addition to giving those certificates to the builders the defendant also gave documents under which the plaintiffs paid, and in my opinion rightly paid, the Disposals Board for some of the prime cost articles, if they may so be called, supplied by the Board. Unfortunately he gave some interim certificates and documents under which the plaintiffs had to pay both the builders and the Board for the same material, chiefly consisting of baths. I had the advantage of going through the certificates and documents and hearing both plaintiffs' witnesses and the defendant's cross-examined about them. I find as a fact, indeed it was not really disputed by the defendant, whose memory was not of such a character as enabled the Court to place absolute reliance on it, that owing to the defendant's negligence he certified that a sum of 221*l.* 3*s.* was due both to the Disposals Board and to the builders. The plaintiffs' witnesses said, and I accept it, that they had paid this sum twice over, and the defendant said: 'I allowed for the baths in my certificate to the builders, the plaintiffs have paid the builders for them; I have also certified that the Disposals Board was entitled to be paid for the baths, the plaintiffs have paid them also for the baths.'

"After considerable delay, which was due to the fault of the defendant, the parties endeavoured to get a final settlement of the accounts, and as late as October, 1923, the defendant went through the accounts with some of the plaintiffs' officials and in effect admitted that he had made a mistake. This is shown by the document entitled: Summary 4. He did not deny the correctness of the sum paid twice over and promised to obtain a refund from the builders. The plaintiffs gave the defendant an opportunity, at his request, to recover the amount of the money, if he could. Unfortunately the builders dissolved partnership and one went bankrupt. The present writ was then issued to obtain the overpaid money from the defendant. Before proceeding further it is necessary to state my finding of fact. I find that owing to the negligence of the defendant the plaintiffs have had to pay the sum of 221*l.* 3*s.* twice over."

Sir Malcolm Macnaghten K.C. and *Gerald Dodson* for the plaintiffs. The defendant was the paid agent of the plaintiffs, the building owners, and was employed by them for the purpose of supervising the work and protecting their interests as against the contractor; and he is therefore liable for negligence in the performance of his duty as such agent: *Rogers* v. *James*. (1) The defendant, for the purpose of seeing that the builders did their work properly and used proper materials, acted merely as the agent of the plaintiffs, the building owners. A. L. Smith M.R. pointed out in *Chambers* v. *Goldthorpe* (1) that " as regards matters in which " the architect " was employed merely as agent for the building owner, he was to protect his interests adversely to the builder, and " he " would be liable to an action by his employer, if he acted negligently in such matters." The decision of the majority of the Court in *Chambers* v. *Goldthorpe* (1)—namely, that the architect in ascertaining the amount due to the contractor and certifying for the same under the contract, occupied the position of an arbitrator, and therefore was not liable to an action by the building owner for negligence in the exercise of those functions, is distinguishable, because the certificate given in that case was a final certificate whereas the certificates given in the present case were only interim certificates, and further there was a dispute in that case between the building owner and the contractor, whereas in the present case there was no dispute between the plaintiffs and the builders; the defendant negligently certified that a sum of money was due both to the builders and the Disposals Board in respect of the same articles and the plaintiffs paid both. These certificates " were made out with a view to regulating the advances, and shewing how much should be paid on account, not at all as shewing how much was to be paid ultimately upon the final account and reckoning " : see per Lord Blackburn in *Tharsis Sulphur & Copper Co.* v. *M'Elroy & Sons.* (2) An architect in giving an interim certificate, which is not a final or conclusive certificate and which is not a condition precedent to payment to the builder, is not acting as a quasi-arbitrator, and is not discharging a quasi-judicial office; he is merely acting as the agent of his employer with a duty to safeguard his interests, and he will be liable if he is negligent in so acting: see Montefiore Brice on Law relating to the Architect, p. 60. The defendant made a mistake in his arithmetical calculations which was a mere ministerial or clerkly duty, and therefore according to Lord Coleridge C.J. in *Stevenson* v. *Watson* (3) an action will lie against him for his negligence. The judgment of Romer L.J. in *Chambers* v. *Goldthorpe* (1) is strongly in my favour. He held that an architect in giving his valuation or estimate would still be acting for his principal, and if he was guilty of negligence, causing damage, would be liable to his principal in an action. He said that the Court in *Wadsworth* v. *Smith* (2) dealt with the question of principle in relation to the ordinary clause in a building contract by which the certificate of an architect is made binding on the parties, and held that under such a clause the architect is not an arbitrator.

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(1) (1891) 8 Times L. R. 67.

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(1) [1901] 1 K. B. 624, 634.
(2) (1878) 3 App. Cas. 1040, 1054.
(3) (1879) 4 C. P. D. 148, 157.

Schiller K.C. and *Linton Thorp* for the defendant. The defendant was acting as a quasi-arbitrator in giving these certificates, and therefore is not liable to his principals in an action for negligence while so acting. The proper test to be applied is not whether the certificate which he gave was a final certificate or an interim certificate. The test is that laid down in *Stevenson* v. *Watson* (3)—namely, whether the functions of the architect in ascertaining the amount due to the builders were such as required the exercise of professional judgment, opinion and skill, and were not merely ministerial. If they are such as require the exercise of professional judgment, opinion and skill the architect occupies the position of a quasi-arbitrator and, in the absence of fraud or collusion, no action will lie against him for negligence. There is no difference in this respect between a final certificate and an interim certificate. Collins L.J. said in *Chambers* v. *Goldthorpe* (4) that an architect stands in the "position of a quasi-arbitrator, i.e. of a person whose duty it is to ascertain impartially the rights and liabilities of two persons as between them not by mere arithmetical calculations but by the exercise of skill and judgment," and he added that the case came within the principle laid down in *Pappa* v. *Rose* (5), *Tharsis Sulphur & Copper Co.* v. *Loftus* (6), and *Stevenson* v. *Watson*. (3) Collins L.J. also said in *Chambers* v. *Goldthorpe* (7)

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(1) [1901] 1 K. B. 642, 645.

(2) (1871) L. R. 6 Q. B. 332.

(3) 4 C. P. D. 148.

(4) [1901] 1 K. B. 641.

(5) (1872) L. R. 7 C. P. 32, 525.

(6) (1872) L. R. 8 C. P. 1.

(7) [1901] 1 K. B. 639.

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"the case seems to come exactly within the law as laid down in *Stevenson* v. *Watson.* (1) I have always looked on that case as the leading case on the subject with which we are dealing. It followed a series of decisions as to the position of a lay person who has to decide a dispute between two parties. Lord Coleridge C.J., after reviewing the authorities, laid down the law as being that, where a matter is left by two parties to the judgment of a third, who is to determine their rights, and the task of so doing is not a mere matter of arithmetic, but involves skill and knowledge, he is in the position of a quasi-arbitrator, and no action will lie against him for what he does in the exercise of his functions as such, except in the case of fraud or collusion." Denman J. in *Stevenson* v. *Watson* (2), dealing with an argument that there might be a distinction in that in one case an actual dispute had arisen, and therefore the architect was an arbitrator, whereas he might not be so before a dispute, said: "But it seems to me that the architect is an arbitrator from the beginning to the end of the contract, he is throughout to have his eye on the work, and give certificates from time to time, all having reference to his final certificate, and unless he gave the duty up altogether from the first appointment, he is from the first a person exercising judgment on a matter on which the parties cannot exercise judgment." Therefore Denman J. there held that an architect in giving an interim certificate is acting as a quasi-arbitrator. *Wadsworth* v. *Smith* (3) has no application. The question in that case was not whether the architect was in the position of an arbitrator, but whether there was a submission to arbitration within the meaning of the Common Law Procedure Act, 1854, which could be made a rule of Court.

Sir Malcolm Macnaghten K.C. replied.

Cur. adv. vult.

July 19. SANKEY J. read a judgment in which he stated the facts set out above and continued: On behalf of the

(1) 4 C. P. D. 148.
(2) 4 C. P. D. 162.
(3) L. R. 6 Q. B. 332.

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defendant four points were taken: (1.) That the defendant was a quasi-arbitrator and, therefore, not liable. (2.) That the action is premature, because there is power to rectify under a final certificate and no final certificate has at present been issued. Should that final certificate be issued it would be found that the builders have not been overpaid, because a sum of 221*l.* 11*s.* 8*d.* is due to them in respect of sums they ought to be allowed for paying increased wages and so in effect plaintiffs have suffered no damage. (3.) If the matter cannot be rectified there has been a final certificate contained in a document known as Summary No. 4, which was the document gone into between the parties to find what the exact position was, and the defendant has issued his final certificate and cannot be sued for negligence. (4.) If the defendant was negligent, so too were the plaintiffs for not keeping and checking their accounts.

I will deal with the last three points at once. As to (2.): In my view there is no power to rectify by giving a final certificate, and for several reasons: (*a*) By reason of the delay in this matter which has been caused by the defendant. As far back as 1923 he admitted the mistake and he was allowed time to see whether he could not get the money out of the builders. They, as above pointed out, were in a partnership which came to an end a considerable time ago, and subsequently one of the partners, who carried on the business by himself, became insolvent and was adjudicated a bankrupt. (*b*) In my view the builders were not entitled to any sum at all in respect of an increase in wages, in fact the Ministry disallowed it.

As to (3.), in my view, Summary No. 4 was not a final certificate. Moreover it was not intended by the defendant to be one, nor was it issued or accepted as such. The real question here is whether the defendant was negligent in giving an interim certificate.

As to (4.), this is a question of fact. I find that the plaintiffs were in no way negligent and that there was no breach of any duty by them, which they owed to the defendant.

I therefore turn to the important part of the case. As to (1.) Was the defendant a quasi-arbitrator and is he, therefore, not liable? In my view an architect under a building contract may occupy two positions: (*a*) He may be merely an agent of the building owner; or (*b*) he may be placed in the position of an arbitrator, or quasi-arbitrator. If he is merely acting as an agent for the building owner he may be liable for negligence. If he is acting as an arbitrator or quasi-arbitrator he is clothed with the duty of exercising an impartial judgment (*Chambers* v. *Goldthorpe* (1)), and he will not be liable for mere negligence. He will only be liable when he has been shown to be fraudulent. In this case there is no suggestion that the defendant has in any way been fraudulent. It was urged before me that in *Stevenson* v. *Watson* (2) both Lord Coleridge C.J. and Denman J. said that in circumstances like the present the defendant would have been in a quasi-judicial position. As it appears to me they said no such thing. The facts of that case have to be carefully looked at. The plaintiff was a builder. The architect had issued his final certificate and refused to reconsider it, and it was held on demurrer in that particular case "that the functions of the architect in ascertaining the amount due to the plaintiff were not merely ministerial, but such as required the exercise of professional judgment, opinion, and skill, and that he, therefore, occupied the position of an arbitrator, against whom, no fraud or collusion being alleged, the action would not lie." But Denman J. points out (3) "the question is what duty did" the architect "here undertake? That depends on the nature of the employment of an architect who acts under a contract of this kind." The remarks at the bottom of p. 161 must be taken to refer to the facts of that case.

A more accurate statement of the law, if I may be allowed to say so, is that of Sir A. L. Smith M.R. in *Chambers* v. *Goldthorpe* (4), where he said: "I have no doubt that, under many clauses of the building contract in this case, the plaintiff

(1) [1901] 1 K. B. 641.
(2) 4 C. P. D. 148.
(3) 4 C. P. D. 161.
(4) [1901] 1 K. B. 634.

acted merely as the agent for the defendant, the building owner, for the purpose of seeing that the builder did his work properly, and used proper materials. As regards matters in which the plaintiff was employed merely as agent for the building owner, he was to protect his interests adversely to the builder, and the plaintiff would be liable to an action by his employer, if he acted negligently in such matters."

Although it is probably right to say that in giving a final certificate the architect acts in a quasi-judicial character unless there is some express clause in the contract to contradict it, it cannot, I think, be asserted that in giving an interim certificate he is so acting. Personally I should have thought that the inference was just the other way—namely, that in giving an interim certificate he is merely acting as agent for the building owner unless there is something in the contract to contradict that; but after all the contract must be looked at to see whether or no in giving an interim certificate the architect was acting as an arbitrator or quasi-arbitrator.

Having regard to the course of business under this contract and having regard to the clause dealing with the method of payment, especially clause 29 (1.), (3.), (5.), I have come to the conclusion that in giving these interim certificates the architect was not acting as an arbitrator or quasi-arbitrator. The interim certificates "were made out with a view to regulating the advances, and showing how much should be paid on account": *Tharsis Sulphur & Copper Co.* v. *M'Elroy*, per Lord Blackburn. (1) The defendant was deciding no dispute, he was settling no final balance; he was, as I think, merely acting as agent for the plaintiffs. He was beyond all question negligent, and in my view he is liable to pay the amount claimed.

There must be judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Lee, Ockerby & Co., for Sharp, Wade & Whittome, Wisbech.*

Solicitors for defendant: *Withers, Bensons, Currie, Williams & Co., for Metcalfe, Copeman & Pettefar, Wisbech.*

R. F. S.

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(1) 3 App. Cas. 1054.

1927
July 21, 22.

SALISBURY AND FORDINGBRIDGE DRAINAGE DISTRICT BOARD *v.* SOUTHERN TANNING COMPANY (1920), LIMITED.

[1925. S. 4584.]

Land Drainage—Commissioners of Sewers—Drainage Board—Mill Dam or Weir—Raising of Height of Weir by Millowner—Right of Drainage Board to remove Enhancement—Trespass—Right of Drainage Board to bring Action for Injunction against Millowner—Sewers Act, 1833 (3 *&* 4 *Will.* 4, *c.* 22), *s.* 47—*Land Drainage Act,* 1861 (24 *&* 25 *Vict. c.* 133), *ss.* 16, 17, 18, 19, 20, 33, 60, 67.

The Land Drainage Act, 1861, enacts by s. 16 that "the powers of Commissioners of Sewers acting within their jurisdiction shall extend to the following acts: (1.) To cleansing, repairing, or otherwise maintaining in a due state of efficiency any existing watercourse or outfall for water . . . . : (2.) To deepening, widening, straightening, or otherwise improving any existing watercourse or outfall for water, or removing mill dams, weirs or other obstructions to watercourses or outfalls for water . . . . : (3.) To making any new watercourse or new outfall for water . . . . or doing any other act not hereinbefore referred to, required for the drainage . . . . of the area comprised within the limits of their jurisdiction . . . . Provided . . . . (4.) That the exercise of the foregoing powers shall be subject to the restrictions hereinafter mentioned."

Sect. 17: "The Commissioners shall not be entitled to remove or otherwise interfere with any mill dam, weir, or other like obstruction, whereby the level of the water is raised for any milling or other purpose of profit, so as to injuriously affect the supply of water, otherwise than with the consent of the owner of such mill dam, weir, or other like obstruction, until the following things have been done; that is to say, (1.) Their right to do so has been determined" by two or more justices in petty sessions. "(2.) Compensation has been made to all parties entitled for the injury which may be caused by such removal or interference."

By s. 18 the justices had to decide whether the proposed removal or interference was necessary for the effectual drainage of the land; whether the proposed removal or interference would cause any injury to the owner; and whether any injury that might be caused by the removal or interference was or was not of a nature to admit of being fully compensated for by money.

By s. 19: The Commissioners were only to be at liberty to make such removal or interference upon making compensation if the decision of the justices was that such removal or interference was necessary and that any injury which might be caused could be fully compensated by money.

By s. 20: "Where the decision" of the justices "is that the Commissioners are entitled to remove or interfere with any such mill dam, weir, or other obstruction, the Commissioners shall take the same steps with respect to compensating the parties interested as are required to be taken by the . . . . Lands Clauses Consolidation Act. . . . ."

By s. 33: "Commissioners of Sewers, acting within their jurisdiction, may, without the presentment of a jury, make any order in respect of the execution of any work . . . . which they might but for this section have made with such presentment" subject to the proviso that any person aggrieved by any such order might appeal therefrom to quarter sessions.

The defendants, who were the owners of an ancient water mill, in order to obtain the maximum of power from their water wheel, raised the height of their mill dam or weir by placing on the top thereof an enhancement of cement, concrete, plank and posts. The plaintiffs, who were constituted under an Order under the Land Drainage Acts, 1861 and 1918, and had the powers of Commissioners of Sewers, and were the drainage board within whose district the mill, mill pond and river at that point were situated, called upon the defendants to remove the enhancement. The defendants refused to do so. The plaintiffs thereupon, without first obtaining a finding of two justices at petty sessions that the removal of the enhancement was necessary for the effectual drainage of land within the jurisdiction of the Commissioners and without having compensation for the injury caused by such removal assessed as provided by ss. 17 to 20 of the Land Drainage Act, 1861, entered upon the defendants' land on several occasions and themselves removed the enhancement, but the defendants on each occasion restored it. The plaintiffs, without having made an order under s. 33 of the Act of 1861, then brought an action against the defendants, alleging that the enhancement held back the water in the river causing the meadows adjacent thereto to be flooded and causing washouts in the banks and that it would interfere with the duty of the plaintiffs effectively to drain their district. The defendants pleaded that the statement of claim disclosed no cause of action, that the weir had existed at the same height for twenty years, and they counterclaimed damages for trespass. The jury found that the defendants were not entitled to the depth of water in the mill pond which they claimed, but that they were entitled to a greater depth of water than the plaintiffs said:—

Held, (1.) that the Land Drainage Act, 1861, did not give the plaintiffs any right to go upon the defendants' land and remove the enhancement to the weir without first obtaining a finding of the justices that its removal was necessary for the effectual drainage of the plaintiffs' district and having compensation assessed, as was provided by ss. 17 to 20 of the Act of 1861, nor had the plaintiffs any right by statute passed before 1861, or at common law, to go upon the defendants' land and remove the obstructions, and therefore the plaintiffs had committed a trespass.

(2.) That s. 47 of the Sewers Act, 1833, did not vest the weir, or the banks, or the bed of the river, or the meadows adjacent thereto in the plaintiffs so as to give them proprietary rights therein, and that therefore the plaintiffs had no right to maintain an action against the defendants for a breach of such proprietary rights.

Stracey v. *Nelson* (1844) 12 M. & W. 535 and *Nesbitt* v. *Mablethorpe Urban Council* [1917] 2 K. B. 568; [1918] 2 K. B. 1 followed.

(3.) That neither s. 16 of the Act of 1861, nor any statute passed before 1861, conferred upon the plaintiffs as Commissioners of Sewers the right to bring an action, without any previous proceedings, to enforce the removal of an obstruction to the drainage of their district, when such obstruction was a mill dam or weir, and further that if s. 16 of the Act of 1861 did give a right to bring an action it was a right subject to the restrictions contained in ss. 17 to 20 of the Act of 1861.

FURTHER CONSIDERATION of an action tried before Salter J. and a special jury at the Winchester Assizes.

The plaintiffs were a drainage board, a corporation constituted by the Salisbury and Fordingbridge Drainage Order, 1923, under the Land Drainage Acts, 1861 and 1918, and as such were a Court of Record and had all the powers given by the said Acts and all other powers which by those or by any other Acts or by custom are vested in Commissioners of Sewers within the limits of their drainage district.

The defendants were the owners and occupiers of a water mill on the river Avon known as Downton Mill, between the city of Salisbury and Fordingbridge. The defendants did not use the mill for its ancient purpose of a corn mill, but to provide electric light for their tannery and other industrial purposes. The mill, mill pond and the river at this point were within the plaintiffs' drainage district.

In the vicinity of Downton Mill there had existed for very many years, on the north-west side of "Wild Weir Hatches," a certain tumbling bay or weir for the discharge of surplus water in and from the river to a lower level thereof so as to prevent waterlogging and flooding of the meadows on either side of the river above the weir.

The complaint made by the plaintiffs was, in substance, that the defendants, in order to obtain the maximum of power for their water wheel, kept their mill pond at a greater depth than that at which they were entitled to keep it, and that they thereby caused the water meadows immediately above the mill pond to become to some extent waterlogged, because the drainage of the meadows was rendered less efficient by reason of the height at which the water was kept in the mill pond. It was said that the defendants had caused this improper height of the water in the mill pond by maintaining the weir, which, together with the hatches, regulated the height of the water in the mill pond, at too great a height.

There was opposite this weir upon an old brick wall on the other side of the river, an old mark, obviously an old water mark, and there was also at the mill a mark which was a peg driven into the wall near the point at which the water entered the mill to turn the wheel. The contention of the plaintiffs was that the defendants were not entitled to keep the water above the old water mark, that is to say that, so far as the flow of water was under their control, they were not entitled by means of the height of their weir, or by manipulation of their hatches, to keep the water at a greater height than that mark. The defendants, on the other hand, said that the mark by which they were entitled to regulate the height of the water in the millpond was the peg above referred to, and there was a considerable difference between the heights of the old mark and of the peg. In the result the jury found that the defendants had acquired by prescription, by constant user for twenty years, a right to have the water in their mill pond at a height which was greater than that shown by the old water mark, but less than that indicated by the peg, that is to say, they found that the defendants had exceeded their rights, but that their rights were greater than the plaintiffs alleged that they were.

The amended statement of claim alleged in para. 3 that "In or about or shortly prior to the month of February, 1923, or alternatively at some date unknown to the plaintiffs but between that month and the month of April, 1925, the defendants without just cause or excuse unlawfully raised or enhanced the crest or head of the said tumbling bay or weir 5.16 inches by adding or fixing thereto on the top thereof cement and concrete and/or a plank and posts (hereinafter called the enhancement) and thereby increased the said tumbling bay or weir and unlawfully obstructed the said river and created a nuisance therein."

The statement of claim went on to allege in paras. 4, 5 and 6 that by a certain letter and by a subsequent written notice the plaintiffs had called upon the defendants to remove or pull down the enhancement; that the defendants did not do so; that the plaintiffs thereupon entered upon the land of the defendants and themselves removed the enhancement; that the defendants restored it; that the plaintiffs again removed it, and that the defendants again restored it.

It was alleged in para. 7: "The enhancement holds back the water in the said river causing and will cause the same to percolate through the banks thereof and to flood the water meadows adjacent thereto, and causes and/or will cause 'washouts' or 'blowouts' in the banks and over-topping of the banks by water from the said river and will interfere with the duty of the plaintiffs effectively to drain and will prevent them from draining their said district and will put them to additional expense therein and will reduce the rateable value of their said district whereby the plaintiffs have suffered and will suffer loss and damage."

The relief claimed by the plaintiffs was: "(1.) An injunction to restrain the defendants their servants or agents from erecting or re-erecting any planks posts timbers enhancement or obstruction upon or of or on the crest or head of the said tumbling bay or weir on the north side of and adjoining Wild Weir Hatches situate on the west side of the River Avon near Downton Mill in the county of Wilts within the jurisdiction of the plaintiffs. (2.) An injunction to restrain the defendants from interfering by their agent or agents with the due performance and carrying out by the plaintiffs of their duties as such drainage board at the said tumbling bay or weir. (3.) A mandatory injunction upon the defendants to remove or pull down the enhancement of the said weir so as to reduce the same to a level of 117.86 feet above ordnance datum. (4.) Damages."

The defendants by their amended defence pleaded that the amended statement of claim disclosed no cause of action against them. They said that no order under s. 33 of the Land Drainage Act, 1861, had been made, or was alleged to have been made, and that without such order the plaintiffs could not sue. They further relied upon ss. 17 to 20 of the Land Drainage Act of 1861. They admitted that they were the owners of Downton Mill and of the tumbling bay or weir "whereby the level of the water is raised for milling and other purposes of profit within s. 17 of the Land Drainage Act, 1861." They said that the effect of reducing the height of the weir would be to injuriously affect the supply of water to the mill and so impair the water power of the mill, and that the plaintiffs were not entitled to interfere with the tumbling bay or weir until their right to do so had been determined in the manner mentioned in s. 17 of the Land Drainage Act, 1861, and the following section. They also pleaded in para. 5: "The said tumbling bay or weir has existed from time immemorial or alternatively for forty years or alternatively for twenty years at the same height at which it has been maintained by the defendants and their predecessors in title for keeping up the level of the water for the purposes of their said mill, and the defendants have a right at common law and/or under the Prescription Act, 1832, to the maintenance of the said tumbling bay or weir at such height or in the alternative, they have the right to do so until the plaintiffs have obtained a decision under and taken the steps mentioned in ss. 17, 18, 19 and 20 of the Land Drainage Act, 1861." They further alleged in para. 6 that they were entitled to a judicial determination by the plaintiffs with a right to appeal therefrom, as provided by s. 33 of the Act of 1861, and that no judicial determination had ever taken place. They counterclaimed that the plaintiffs had, without any right or justification, entered and trespassed upon their property and had interfered with this weir by pulling away the upper part of it, and they claimed damages for the trespass.

The plaintiffs by their reply admitted that no order had been made under s. 33 of the Act. Para. 3 was in these terms: "The plaintiffs admit that the said tumbling bay or weir (whereby the level of the water is raised for milling and other purposes of profit as alleged) has existed for forty years at the least but not at the same height, and they further admit for the purposes of this action only that if the same has been maintained at the same height, as alleged in para. 5 of the amended defence (which is denied), the defendants have the rights claimed by them in paras. 5 and 6 of the amended defence and that there was no such judicial determination. Paras. 2 and 3 of the amended claim are repeated."

At the trial it was agreed to reserve the question whether any cause of action was disclosed by the statement of claim for further consideration, and to assume that there was a cause of action, and to take the verdict of the jury upon the issues of fact which were raised by the pleadings.

The questions which were put to the jury, after having been shown to counsel and approved by them, together with the answers of the jury, were as follows :—

1. "Was the present depth of water (i.e., up to the peg, 118 feet 8⅖ inches above ordnance datum) actually enjoyed by the defendants and their predecessors as of right without interruption from 1905 to 1925 ?" Those were the twenty years before action brought. Answer : "No."

2. "Was any depth of water greater than is shown by the bench mark (118 feet ¼ inch above ordnance datum) actually enjoyed by the defendants and their predecessors as of right without interruption from 1905 to 1925 ?" Answer : "Yes." "If 'Yes,' what depth ?" Answer : "118 feet 2½ inches; 4 inches above the masonry crest."

3. "Is the present depth of water injurious to the drainage of the meadows above the weir ?" Answer : "Yes."

4. "Did the defendants at some time between 1922 and 1924 increase the height of the weir ?" Answer : "Yes."

The result was that whereas the defendants claimed that they were entitled to a depth of water up to 118 feet 8⅖ inches above ordnance datum, and whereas the plaintiffs alleged that all the defendants were entitled to was a depth of water up to 118 feet ¼ inch above ordnance datum, the jury found that the defendants were entitled to a depth of water up to 118 feet 2½ inches, that is to say 2¼ inches more than the plaintiffs said and some 6 inches or thereabouts lower than the defendants claimed.

The question whether the plaintiffs had alleged or proved any cause of action against the defendants was adjourned for further consideration in London.

Holman Gregory K.C. and *A. H. Armstrong* for the plaintiffs.
du Parcq K.C. and *Wethered* for the defendants.

SALTER J. This case raises a question of some importance with regard to the right of drainage boards and Commissioners of Sewers to bring actions in respect of alleged obstructions to the drainage within their districts.

The action was tried before me with a special jury at the last Winchester Assizes. The defence, among other things, alleged that the statement of claim disclosed no cause of action by the plaintiffs against the defendants. It was agreed that the wiser course would be to reserve that question and to assume for the moment that there was a cause of action, and to try with the aid of the jury the issues of fact which were raised by the pleadings. [His Lordship stated the facts substantially as set out above and continued]

The question now arises whether the plaintiffs have shown as against the defendants a cause of action for any part of the relief claimed.

The Land Drainage Act, 1861, under which the plaintiffs as a drainage board exist and are empowered, provides for two methods by which the Commissioners of Sewers, whose powers the plaintiffs have, may deal with and cause the removal of that which is in fact an obstruction to the drainage of their district. The first of those methods is by way of actual physical removal, the second is by way of judicial decision and order. The first method, actual removal, as regards mills and matters of that kind is regulated by ss. 16 to 20 of the Act. Those sections give the authority power to remove obstructions to the drainage of their district, but such right is subject to the restrictions contained in ss. 17, 18, 19 and 20. Those sections provide that: "The Commissioners shall not be entitled to remove or otherwise interfere with any mill dam, weir, or other like obstruction, whereby the level of the water is raised for any milling or other purpose of profit," unless the Commissioners first obtain the finding of two justices that the removal of the alleged obstruction is necessary for the effectual drainage of their district, and also a finding that any damage or any injury thereby caused to the millowner is of a kind that can be fully compensated for in money. Unless a finding can be obtained from two justices in petty sessions upon both those points there is no right to remove the obstruction. If a finding upon both of those points can be obtained from the justices at petty sessions then compensation has to be assessed, and upon payment of that compensation the Commissioners have a right to remove the obstruction. That is the method by way of removal. The other method is under s. 33. The Commissioners of Sewers acted for the most part with a jury, but in some matters they were entitled to act without a jury. Sect. 33 of the Act of 1861 provides as follows: "Commissioners of Sewers, acting within their jurisdiction, may, without the presentment of a jury, make any order in respect of the execution of any work, the levying of any rate, or doing any act which they might but for this section have made with such presentment; subject to this proviso, that any person aggrieved by any such order made by the Commissioners without the presentment of a jury may appeal therefrom in manner hereinafter mentioned." Whether the Commissioners of Sewers could enforce the removal of an obstruction, when the obstruction was a weir, by making an order under s. 33, and whether they would then be entitled, if the owner of the mill either did not appeal to quarter sessions or quarter sessions upheld the order, to remove the weir without the proceedings contemplated in ss. 17 to 20 as to compensation, it is not necessary to determine. This is the second method provided by the Act to enable the Commissioners to carry out their duties and to remove obstructions.

The plaintiffs in this case intended to proceed under s. 33 and to make an order under that section, and when they brought this action they were under the impression that they had made an order under that section and they so pleaded. Para. 5 of the statement of claim as it originally stood was as follows: "By order dated the 12th August, 1925, and duly served on the defendants upon the same day the plaintiffs in exercise of their statutory powers under ss. 33, 60 and 67 of the Land Drainage Act, 1861, in that behalf ordered and directed the defendants within fourteen days from the date thereof to remove or pull down the enhancement of the said tumbling bay or weir so as to reduce the same to a level of 117.86 feet above ordnance datum." The action was brought to enforce, as was thought, obedience to an order. Whether if they had made an order under s. 33 an action would have been a proper way, or the proper way, of enforcing obedience to it, need not now be considered. In fact they had made no order. The defendants were so advised and applied for a writ of certiorari on two grounds—namely, that this was not an order in matters of form, and that in any case it was invalid as an order in that one of the Commissioners who had taken part in making it had an interest in the matter. It is unnecessary to deal further with that matter, because when the case came before the Divisional Court it was admitted on behalf of the plaintiffs that this was not an order, and it was agreed that the pleadings should be amended so as to contain an express admission that no order had been made under s. 33 or at all, and upon that the Court made no order upon the motion for the rule except as to costs, and the pleadings were amended accordingly.

Now upon the pleadings as they stand I have to consider, and I think it will be convenient to consider first, the question, which is much the shortest and simplest, whether it was a trespass, as alleged in the counterclaim, for the plaintiffs to go, as they did upon more than one occasion, on the lands of the defendants and forcibly to remove a portion of this weir. If the plaintiffs had a right to remove the weir, then of course it was no trespass, but if they had no right it was a trespass, therefore, the question is whether they had a right to remove the weir.

That brings me to s. 16 of the Act of 1861, which provides that "the powers of Commissioners of Sewers acting within their jurisdiction shall extend to the following acts." The section then gives them power to cleanse, repair and maintain any existing watercourse or outfall for water, to deepen, widen, straighten or otherwise improve any existing watercourse or outfall for water, or to remove mill dams, weirs or other obstructions to watercourses or outfalls for water, and, thirdly, to make new works for the purpose of maintaining and improving the drainage of their district. There are four provisoes to that section, the last of which is: "That the exercise of the foregoing powers shall be subject to the restrictions hereinafter mentioned." Sect. 17 provides that "the Commissioners shall not be entitled to remove or otherwise interfere with any mill dam, weir, or other like obstruction, whereby the level of the water is raised for any milling or other purpose of profit"—that is this case—"so as to injuriously affect the supply of water"—that is this case—"otherwise than with the consent of the owner of such mill dam, weir, or other like obstruction"—no such consent was obtained—"until the following things have been done," that is to say the miller has the protection of the findings of the justices.

In my opinion the meaning of ss. 16 to 20 is quite clear when you are dealing with a mill dam or weir of this kind. They give to the authority no power in any way to interfere with a weir such as this except after the intervention and decision of justices as there provided. In my opinion the Act of 1861 gave no power to the plaintiffs to do what they did, that is to say, to come upon the lands of the defendants and interfere with their property, without conducting any judicial inquiry or obtaining the sanction of any justices.

Sect. 60 of the Act of 1861 provides that: "All powers given by . . . . this Act shall be deemed to be in addition to and not in derogation of any other powers conferred on Commissioners of Sewers by Act of Parliament, law or custom; and Commissioners of Sewers may exercise such other powers in the same manner as if this Act had not passed." Therefore, if the plaintiffs, who are and have the powers of Commissioners of Sewers, could before the Act of 1861 lawfully have done what they did in this case, then it was no trespass for them to do what was done. With regard to that matter I have not found any power under earlier statutes, nor any authority for saying that at common law the plaintiffs had any right to go upon the lands of the defendants and interfere with this property in the circumstances in which they did so. For these reasons I think that what the plaintiffs did was a trespass and the counterclaim succeeds. The damages were agreed at 10*l.*

I now come to a matter which is, in my opinion, more difficult, and that is as to the right of the plaintiffs to bring this action against these defendants, that is to say, whether the statement of claim alleges, and whether the evidence proved a legal right on the part of the plaintiffs to any part of the relief claimed.

It is obviously necessary in the first place to see what this action is. Is it to be regarded as an action brought by the plaintiffs in virtue of proprietary rights in them in the meadows and banks alleged to be injured and threatened? It is clear that the proprietor of one of these meadows immediately above the weir, which was to some extent injured by the undue height at which the water was being kept, might have brought an action against the owner of the mill, and have obtained damages, or an injunction, or both, and that a twenty years' prescription, if the defendant could have proved it, would have been a good defence to such an action. It would then have been shown that his meadow had become servient to the dominant tenement of the mill, and that he could no longer complain of the injury done to his meadow by reason of the fact that the water in the mill pond was kept at a level to which the miller had become entitled from long user, openly and as of right. Now is this an action brought upon that footing? Is it an action brought upon the footing that the plaintiffs have and are entitled to exercise rights in respect of these meadows which are the same as those which the owner of the injured meadow could exercise, so that unless a prescriptive right to dam the river to this extent can be proved, they would have a right to cause the obstruction at the weir to be removed? Is it an action of that kind, or is it an action brought by a public authority, in the discharge of their public duties, to enforce the removal of something which is in fact an obstruction to the efficient drainage of their district? That, it seems to me, would be an action of an entirely different kind, and one has to consider first which of those two kinds of actions this action is. It seems to me quite clear upon the pleadings that this was intended to be and is an action of the former kind; it was so conducted and so fought for four days. It was an action complaining of injury to the meadows above the weir and to the banks which separate the water from those meadows. It was said that the water was kept to such a height as to interfere with the drainage of the meadows, and that the banks which kept the water from flooding the meadows were being injured, and the water was making its way over into the meadows, and the defence raised was prescription. It appears to me that if this were an action to prevent interference with the plaintiffs in the discharge of their public duties, or an action to enforce the removal of something which was obstructing the efficient drainage of the district, any question of prescription would be quite immaterial. It is true that there is an allegation here that the water had been kept to this depth from time immemorial. The jury did not so find and were not asked so to find. This is no doubt a very old mill, it used to belong to the Bishops of Winchester, and it doubtless has been there for centuries, but that is not the point; the point is whether the present depth of water has been maintained for twenty years, forty years or from time immemorial. No attempt was made to show that it had been so maintained for forty years, and certainly no attempt was made to show that it had been so maintained from time immemorial; indeed the evidence all went to show that if any right had been acquired to keep it at the full height which the defendants claimed, it was a user for not more than twenty years, or very little more than twenty years, and the dispute before the jury turned on whether or not a twenty years' prescription had been made out. With regard to the suggested existence of this weir, from time immemorial, I do not profess to understand the principle of the decision in the case of the *Monmouth Weir*. (1) There the Commissioners having taken all proper proceedings to remove the weir, or some such obstruction which was in the river Wye in their district, it was held that they had no right to remove it, because the weir was an ancient weir which had existed from time immemorial. I will suppose that that means that the things complained of had existed from time immemorial. I do not myself understand on what principle that would deprive the plaintiffs of their statutory right, or relieve them from their statutory duty of removing a thing which was in fact an obstruction to the drainage of their district. It is, however, not necessary to go further into that matter, because here there was no suggestion that this obstruction, namely, the weir, as complained of, and the depth of water resulting therefrom, were things which had existed from time immemorial. Prescription was pleaded and the defence relied upon was twenty years' prescription. Moreover it was admitted in the reply: "That if the same has been maintained at the same height as alleged in para. 5 of the amended defence (which is denied)"—that is to say, if it had been maintained at the same height for more than twenty years—"the defendants have the rights claimed by them in paras. 5 and 6," that is, a right to succeed in this action; so it is admitted on the pleadings that twenty years' prescription, if made out, is a good defence to this action.

That seems to me to show quite clearly that this is an action based upon the footing that the plaintiffs are entitled to exercise the same rights as the rights of adjoining riparian proprietors, otherwise twenty years' prescription could not be any defence against them. Moreover, the evidence was entirely the evidence which is always brought in cases between adjoining riparian proprietors where prescription is set up, evidence of old inhabitants and persons who have known the place for many years, evidence of continuous user,

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(1) (1621) Callis on Sewers, 3rd ed., p. 310.

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evidence of interruption and evidence of objection made, and so forth. Now dealing with the action as an action of that kind—I am going to deal with it later as an action of the other kind—have the plaintiffs any proprietary right which would support such an action? In *Duke of Newcastle* v. *Clark* (1) the Commissioners of Sewers were seeking to bring trespass in respect of their own works, things which they had themselves made and paid for, and it was held that they had no right to sue. This decision resulted, I should think not unnaturally, in s. 47 of the Sewers Act of 1833 being passed. That section declares that "the property of and in all lands, tenements, hereditaments, buildings, erections, works, and other things which shall have been or shall hereafter be purchased, obtained, erected, constructed, and made by or by order of, or which are or shall be within or under the view, cognizance, or management of any Commissioners of Sewers, with the several conveniences and appurtenances thereunto respectively belonging . . . . shall be and the same are hereby vested in the Commissioners of Sewers. . . . ." The meaning of that section came before the Court of Exchequer in *Stracey* v. *Nelson* (2) and that Court, perhaps, if one may presume to say so, slightly straining the actual wording of the section in order to give effect to the obvious intention of Parliament, decided that the meaning of that section was that it vested in the Commissioners of Sewers their own works and their own property and no more, and that it did not vest in the Commissioners the property in all lands under their "view, cognizance, or management." In *Crossman* v. *Bristol and South Wales Union Ry. Co.* (3) there was a deposit of "chessel" or beach in the river Severn which was under the jurisdiction of Commissioners of Sewers, and was extremely valuable as a protection against the sea, and the Commissioners had always refused all applications to remove any part of it. An application was made by the defendant railway company, who had purchased the site of the deposit from the lord of the manor, to remove

(1) (1818) 8 Taunt. 602.

(2) 12 M. & W. 535.

(3) (1863) 11 W. R. 981.

some of it, which was refused, and thereupon the railway company took it without leave, and the Commissioners brought an action and obtained an interim injunction. What exactly the relief was which was claimed does not, I think, appear from the report, and there is nothing to show what became of the case; the Court was only concerned with an interim injunction. It was a very strong and special case, and in those circumstances, *Stracey* v. *Nelson* (1) apparently not having been quoted, an interim injunction was granted.

In *Nesbitt* v. *Mablethorpe Urban Council* both Bailhache J. (2) and the Court of Appeal (3) followed *Stracey* v. *Nelson* (1) in construing the meaning of s. 47 of the Sewers Act, 1833. In this state of the authorities I have no doubt at all that I ought to follow *Stracey* v. *Nelson* (1) and *Nesbitt* v. *Mablethorpe Urban District Council* (3), and to hold that this section does not vest this weir, or the banks or the bed of this river, or these meadows, or any part of them, in the plaintiffs so as to give them any proprietary rights. It is to be observed that the statement of claim does not allege that the plaintiffs have any property in any of those things. Therefore if this action is to be treated, as I think it must be treated in its form and on the evidence, as an action based upon proprietary right, I think that no cause of action was alleged or proved.

I will now consider the matter upon the footing that this case can be treated as one in which the plaintiffs are alleging a cause of action apart from any right of property. It is said that they have a right to sue given to them by s. 16 of the Act of 1861. The side-note to that section is: "Declaration of powers of Commissioners." The section provides that: "The powers of the Commissioners of Sewers acting within their jurisdiction shall extend to the following acts: (1.) To cleansing, repairing or otherwise maintaining in a due state of efficiency any existing watercourse or outfall for water, or any existing wall or other defence against water. . . . . (2.) To deepening, widening, straightening or otherwise improving any existing watercourse or outfall for water, or removing mill dams, weirs, or other obstructions to watercourses, or outfalls for water, or raising, widening or otherwise altering any existing wall or other defence against water. . . . (3.) To making any new watercourse or new outfall for water, or erecting any new defence against water, to erecting any machinery or doing any other act not hereinbefore referred to, required for the drainage . . . . of the area comprised within the limits of their jurisdiction. . . . ." In my opinion that is a section which is confined to works, and to acts which the Commissioners may do to keep in good order, to improve and to add to existing physical things in their district. It is not, in my opinion, a section which confers any right to bring actions which did not exist before. In the next place I think that even if the section does give a right to bring an action, it gives that right subject, so far as "any mill dam, weir or other like obstruction, whereby the level of the water is raised for any milling or other purpose of profit," is concerned, to the restrictions contained in ss. 17, 18, 19 and 20, and that if it gives any right to sue to enforce the removal of a mill dam it only gives that right after the steps contemplated in ss. 17 to 20 have been duly taken. If that section does not give a right to bring an action, was there any right to bring an action in existence before the Act of 1861 was passed, because if there was, then the plaintiffs may enjoy it by virtue of s. 60 of the Act of 1861. With regard to that I think that the absence of precedents of actions, I will not say of this kind, but of actions such as this case might have been if the pleadings had been differently drawn, and the evidence differently directed, the absence of all such cases is very strong to show that there did not exist in the Commissioners of Sewers before the Act of 1861 was passed a right to bring an action of this kind to enforce, without any previous steps having been taken, the removal of an alleged obstruction to the drainage of their district. In *Duke of Newcastle* v. *Clark* (1), which was an exceedingly strong case, and a decision which brought about legislation, Burrough J. said (1): "My Lord Chief Justice has truly observed that, as there has been no instance of such an action, it is a strong presumption, under the circumstances of this case, that no such action could be maintained." It is true that there is the decision of Wood V.-C. to the contrary effect in *Crossman* v. *Bristol and South Wales Union Ry. Co.* (2), but upon all the authorities I think that that is not a decision which ought to affect my judgment in this case. I can find no reported case which can fairly be said to be an action brought by Commissioners of Sewers without any previous proceedings to enforce the removal of an obstruction to the drainage of their district. The Commissioners of Sewers are a Court of Record; they are armed with ample powers for the removal of obstructions, and for the discharge of all their duties, and I do not think that it was intended that they should bring actions, I will not say in a case like this, but in a case such as this might have been.

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(1) 12 M. & W. 535.

(2) [1917] 2 K. B. 568.

(3) [1918] 2 K. B. 1.

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(1) 8 Taunt. 602.

With regard to the highway cases, I think there is no analogy between those cases and the present case. In the case of highways there is a statutory vesting of the highway itself in the highway authority, and, moreover, the obstruction of a highway is a public nuisance. I do not find in these pleadings any allegation of a public nuisance, and certainly I think there is no evidence to support such an allegation. *Bagshaw* v. *Buxton Local Board of Health* (3) was a most exceptional case, the Master of the Rolls was there dealing with an equitable remedy, and all he said was that in the circumstances of that case he would not interfere to restrain a public authority from removing a thing which he found to be a nuisance. There is nothing in that case, or in any of the highway cases, to alter the view which I have taken on this matter.

Then there is the gas case: *London County Council* v. *South Metropolitan Gas Co.* (4) In that case there were a series of statutes which authorized the predecessors in office of the

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(1) 8 Taunt. 631.

(2) 11 W. R. 981.

(3) (1875) 1 Ch. D. 220.

(4) [1904] 1 Ch. 76.

London County Council to make a daily testing of the quality of the gas supplied by the South Metropolitan Gas Company. It had been customary to make those testings on the six working days of the week, and not on Sundays; the London County Council, however, claimed that the gas examiners whom they appointed had a right and therefore were under a duty to make the testings seven days in the week. The defendants differed from that reading of the statutes and refused to admit the gas examiners on Sundays, and thereupon the London County Council brought an action for a declaration that the gas examiners were entitled to make daily (including Sunday) tests of the gas supplied and for an injunction to restrain the defendants from preventing such gas examiners from making tests on Sundays, and it was held that they were entitled to do so. That was a case in which the London County Council were being obstructed in the exercise of their public duties, and, further, it was a case in which it was necessary to obtain the decision of the Court as to the meaning of the statute. In this case there is no allegation and no proof of any obstruction by the defendants of the plaintiffs in the exercise of their public duties. The only thing the plaintiffs did was to trespass on the premises of the defendants, and for the defendants to resist that is no obstruction by them of the plaintiffs in the discharge of their duties, nor does any question arise for the decision of the Court as to the meaning of the statute. I think therefore there is nothing in that case to assist me in the present case.

In this case no declaration is claimed, and, as I have already said, there is no allegation of interference with the plaintiffs in the discharge of their public duties. Therefore, I come to this conclusion: that if this had been an action in which the plaintiffs had alleged and proved that this was a public nuisance—I do not think that they alleged it, and certainly they did not prove it—or in which they had alleged and proved that this was an obstruction to the general drainage of their district—I do not think that they alleged that, and they certainly did not prove it—but if this had been an action of that kind—inasmuch as the alleged obstruction is a mill dam—I am clearly of opinion that the plaintiffs would not have been entitled to bring an action for an injunction except after proceedings under ss. 16 to 20, or s. 33. As I said just now, I should think it would be very arguable whether they could, in the case of a mill dam, succeed under s. 33 without giving the defendants the rights which are given by ss. 16 to 20, but it is unnecessary to consider that question. I do not propose to express an opinion as to what the rights of the parties would have been if the alleged obstruction had not been a mill dam.

With regard to the right of a public body such as a drainage board to sue, without any previous steps for the removal of something which was said to be an obstruction to the drainage of their district, I will refer to the observations of Romer L.J. in *Devonport Corporation* v. *Tozer.* (1) The plaintiffs in that case were a municipal corporation and the defendants were erecting certain houses at Devonport which the plaintiffs said infringed their by-laws, and they sued and claimed an injunction and declaration that they were entitled to pull down and remove any work begun or done by the defendants in contravention of the by-laws. The by-laws, which were framed under the Public Health Act, 1875, prescribed a penalty for infringement, to be recovered by summary proceedings, and provided that the plaintiffs might remove or pull down any work begun or done in contravention of the by-laws. It was held that in those circumstances they had no right to sue. Romer L.J. said (2): "The decision of Joyce J. on the question of whether this action would lie without the Attorney-General being a party, appears to me to be a perfectly right decision. It is to be borne in mind that the plaintiffs here have no proprietary rights which are being interfered with by what is being done by the defendants. The plaintiffs, no doubt, have powers conferred upon them to make by-laws, but that alone gives them no special rights over other bodies, or other members of the public, as to initiating proceedings to

(1) [1903] 1 Ch. 759.

(2) [1903] 1 Ch. 764.

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Salter J.

enforce those by-laws. Such powers as the plaintiffs, the public body, have to enforce by by-laws, must be conferred upon them by special powers given to them by statute, and, in fact, you do find special powers here given; and, except in so far as special powers are given, they have no inherent right to take proceedings. And I think it is rather to be deprecated that public bodies such as the plaintiffs in this case should be at liberty, without the leave of the Attorney-General, to commence expensive proceedings, such as these, at their own will. The fact that you do find a special power given to a public body, such as the plaintiffs, to initiate proceedings at law, or in equity, in certain special cases, is an additional proof that the legislature never contemplated that, apart from special legislative permission, they should have a right to take any proceedings they might think fit for the purpose of enforcing the by-laws, apart from the special power conferred upon them by statute." I think that those general observations are very material in this case.

The result is that in my opinion the plaintiffs have never alleged nor proved any cause of action against the defendants for any part of the relief claimed. The action therefore fails, but the counterclaim succeeds, and I must enter judgment for the defendants in the action, and also on the counterclaim for the sum of 10*l.*

Judgment for defendants.

Solicitors for plaintiffs: *Woodcock Ryland & Parker, for Louch & Son, Langport.*

Solicitors for defendants: *Torr & Co., for Osborne, Ward, Vassall, Abbot & Co., Bristol.*

R. F. S.

[IN THE COURT OF CRIMINAL APPEAL.]

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THE KING *v.* DORA HARRIS.

Criminal Law—Right of Judge to call Witness after Close of Defence—Limitation upon Exercise of Right—Warning to Jury against accepting Evidence of Accomplice without Corroboration.

A judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, without the consent of either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice, but in order that injustice should not be done to an accused person, a judge should not call a witness in a criminal trial after the case for the defence is closed, except in a case where a matter arises ex improviso, which no human ingenuity can foresee, on the part of the prisoner.

Rule laid down by Tindal C.J. in *Reg.* v. *Frost* (1839) 4 St. Tr. (N. S.) 86, 386; 9 C. & P. 129, 159 applied.

Appeal from a conviction.

The appellant, Dora Harris, was tried, together with four other persons, before the Recorder at the Liverpool City Sessions. The two male prisoners, James William Benton and Keyran Meagher, were charged with stealing a quantity of goods, and the other three prisoners, the appellant, Lily Sing Sai and Catherine Lightburn, were charged with receiving the goods knowing them to have been stolen. The two male prisoners pleaded guilty to the charge of stealing the goods, but the three women pleaded not guilty to the charge of receiving the goods knowing them to have been stolen. The case then proceeded against the three women, the two male prisoners who had pleaded guilty to the charge of stealing the goods remaining in the dock, as they had not been sentenced. Evidence was given on the part of the prosecution which undoubtedly established a prima facie case against the three women of receiving the goods knowing them to have been stolen. Thereupon each of the three women went into the witness box and gave evidence to the effect that they had bought the goods not knowing them to have been stolen, and they were cross-examined by counsel on behalf of the prosecution. That concluded the case on the part of the defence.

The Recorder then said to the prisoner Benton: "Benton, are you prepared to give evidence?" Answer: "Yes."

The Recorder: "I am asking you to give evidence here. I simply want you to tell the truth. You must not imagine you are getting any advantage whatever from what you say." Answer: "Yes."

The Recorder: "I think it is more satisfactory we should hear the boy on the subject. The prosecution, as is usual in these cases, do not call him. I think we might as well. I do not know what he is going to say, but I have some idea."

Thereupon the prisoner Benton was called and gave evidence, which made the case against the appellant Harris much stronger than it had been before. At the conclusion of the examination-in-chief, which was conducted by the Recorder himself, the Recorder said: "It is the practice in a case like this to allow cross-examination though there is no claim as of right." Benton was then cross-examined by counsel on behalf of the appellant.

The appellant Harris was not, however, asked whether she would like to go back into the witness box to give further evidence, and no opportunity was given to her to contradict the evidence of Benton.

Upon the conclusion of Benton's evidence the Recorder was of opinion that there was no case against the woman Lightburn, and he accordingly directed the jury to return a verdict of not guilty against her. Counsel for the appellant Harris then addressed the jury on her behalf, and the Recorder summed up the case to the jury.

In the course of his summing up the Recorder said: "Let us take this boy's evidence. You must understand, members of the jury, that this boy is what is called an accomplice on his own story, and the law as regards the evidence of accomplices is this: It is the duty of the judge at the trial to warn a jury that the evidence of accomplices must be received with suspicion. It is not the duty of the judge to tell the jury they must not accept the evidence of accomplices unless it is corroborated, but it is better to tell the jury that they should always look very carefully at such evidence and, if

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possible, find corroboration of it before they accept it. But, of course, there are cases, many cases, where people are convicted upon the evidence of accomplices, because the jury have heard the evidence of accomplices, and having heard the evidence they accept it, even though it is uncorroborated, and they are entitled to. If you heard that boy's evidence to-day, and you came to the conclusion that the boy is speaking the truth, you would be perfectly entitled to act upon that evidence, even though there were no other, but there are very few cases in which one would encourage a jury to do it. Look at that boy's evidence. The prosecution, as is usual in these cases, did not tender the evidence. I thought it was important you should hear that evidence—I often do in these sort of cases—and I thereupon called the boy before you, only knowing quite roughly what he might say, because I knew of this statement he had made. I thought it was right he should be put in the box and Mr. Fyfe should have the opportunity of cross-examining. If his story is true of course there is an end of the case."

In the result the appellant Harris was convicted and sentenced to fifteen months' imprisonment with hard labour.

Maxwell Fyfe for the appellant Harris. The main ground of the appeal is that the Recorder called a co-prisoner as a witness after the case for the defence had been closed. It is true that in practice the judge in criminal cases has a discretion, and may call a witness not called by the prosecution: see Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 1, sub-s. 2, which provides for the payment of compensation to any person called to give evidence at the instance of the Court. A judge should, however, only exercise his discretion for very special and extraordinary reasons. In *Reg.* v. *Chapman* (1) Lord Abinger C.B. approved the suggestion that a certain witness should be called by the prosecution, as he was present when the murder took place. In *Reg.* v. *Holden* (2) Patteson J. himself called a witness whom the prosecution refused to call because her name was not on the

(1) (1838) 8 C. & P. 558.

(2) (1838) 8 C. & P. 606.

back of the indictment. In both those cases, however, the witness was called before the case for the prosecution had been closed. If a judge does exercise his discretion the witness should be called before the close of the case for the prosecution. In the present case the witness was not called till the case for the defence had been closed, and therefore the defence could not deal with or rebut that evidence. In civil cases the procedure was stated by Lord Esher M.R. in *Coulson* v. *Disborough* (1) to be as follows: "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him." That dictum was criticized by Fletcher Moulton L.J. in *In re Enoch and Zaretsky, Bock & Co.* (2), where the Court of Appeal held that neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties. In both of those cases the Court of Appeal laid down that if a judge calls a witness neither party can cross-examine him as of right. At common law there was no distinction between civil and criminal cases with regard to the rules of evidence.

[AVORY J. Has it not been laid down that the rule in *In re Enoch and Zaretsky, Bock & Co.* (3) has no application in a criminal case? He referred to Taylor on Evidence, 10th ed., para. 1430.]

[SALTER J. The rule in *In re Enoch and Zaretsky, Bock & Co.* (3) is that a judge in a civil action must find out the truth so far as the parties are willing to allow him to arrive at it, and that he is bound by the evidence tendered, but in criminal cases the rule is different.]

[LORD HEWART C.J. In civil cases the dispute is between the parties and the judge merely keeps the ring, and the parties need not call hostile witnesses, but in criminal cases the prosecution is bound to call all the material witnesses before the Court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury. The intervention of the judge by calling a witness is nearly

(1) [1894] 2 Q. B. 316, 318.
(2) [1910] 1 K. B. 327, 332.
(3) [1910] 1 K. B. 327.

always in the interests of the prisoner. But if a judge calls a witness after the defence has been closed, how can the defence deal with that fresh evidence ?]

The rule laid down in *Coulson* v. *Disborough* (1) and *In re Enoch and Zaretsky, Bock & Co.* (2), that where a witness is called by the judge neither party has the right to cross-examine him, applies also to criminal cases. Lord Esher M.R. said in *Coulson* v. *Disborough* (3) that "the judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers." In *Reg.* v. *Cliburn* (4) it was held that counsel had no right to cross-examine a witness called by the Court after the close of the case for the prosecution, but counsel was allowed to put questions to him. A judge should not exercise his discretion and call a witness in a criminal case when he knows that the witness is going to make a statement favourable to the prosecution and which will be a calculated attack on the prisoner, the prosecution not having chosen to call him as a witness. If such a witness is called by the prosecution it is known that the prosecution is relying upon a discredited witness, but if such a witness is called by the judge the witness goes into the witness box with the imprimatur of the judge, and the prosecution is relieved from the necessity of calling an undesirable witness.

[SALTER J. What ought to happen if the judge knows that the witness he calls is going to make a statement favourable to the defence ?]

He ought to leave it to the defence to call the witness. There is no reason why he should give the defence the last word. There is no authority to support the calling of a witness by the judge after the case for both the prosecution and defence has been closed. *Rex* v. *Baguley* (5) shows that

(1) [1894] 2 Q. B. 316.
(2) [1910] 1 K. B. 327.
(3) [1894] 2 Q. B. 318.
(4) (1898) 62 J. P. 232.
(5) (1925) 19 Cr. App. R. 54.

this Recorder makes a practice of calling the thief as a witness against the receiver. In that case and also in the present case the witness, although convicted, had not been sentenced. It is contrary to the usual practice to call such a witness: see *Rex* v. *Tomey*. (1)

[AVORY J. referred to *Rex* v. *Sullivan* (2), where it was held that a judge has in a criminal trial a discretionary power of recalling witnesses at any stage of the trial and of putting such questions to them as the exigencies of justice require.]

G. Justin Lynskey for the Crown. The Recorder was right in calling Benton as a witness and in admitting his evidence. It is clear that a judge has an inherent right in a criminal trial to call a witness not called by the prosecution or the defence, and there is no such limitation on the exercise of that power as has been suggested—namely, that he can only exercise his power for special and extraordinary reasons. The reason for the existence of the right of the judge to call a witness is for the furtherance of justice: see *Reg.* v. *Holden* (3), per Patteson J., *Reg.* v. *Cliburn* (4); Roscoe's Criminal Evidence, 14th ed., pp. 159, 160; Taylor on Evidence, 11th ed., para. 1430. In *Reg.* v. *Frost* (5) Tindal C.J. laid down the general rule that "where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins"; but the Chief Justice went on to lay down an exception to that rule, because he continued: "but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown." That exactly applies to the present case.

(1) (1909) 2 Cr. App. R. 329.

(2) [1923] 1 K. B. 47.

(3) 8 C. & P. 610.

(4) (1898) 62 J. P. 232.

(5) (1839) 4 St. Tr. (N. S.) 86, 386; 9 C. & P. 129, 159.

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[Lord Hewart C.J. The statement of Benton in writing was in existence at the commencement of the case. Did the necessity for making use of that statement arise suddenly, although it was in existence before ?]

In *Cliburn's* case (1) the witness was called by the judge after the case for the prosecution had been closed, and counsel for the defence had stated that he did not propose to call any witnesses. It is true that Benton's evidence rebutted the evidence of the appellant Harris, but it also corroborated the evidence of another person. There is no reason why that evidence should not have been called if the principle is to enable justice to be done. Justice may require that a prisoner should be convicted as much as that in a particular case he should be acquitted. Even if the Recorder had not called Benton the evidence against the appellant was such that the jury must inevitably have convicted her, and therefore there has been no miscarriage of justice, and the proviso to sub-s. 1 of s. 4 of the Criminal Appeal Act, 1907, applies.

[Lord Hewart C.J. In *Reg.* v. *Haynes* (2) Bramwell B. refused to allow a witness to be called after the case for the prosecution and the defence had been closed.]

[Avory J. Assuming that the witness was properly called, was a proper warning given to the jury as to the danger of acting upon his evidence since he was an accomplice ? How can the summing up of the Recorder be reconciled with the judgment of this Court in *Rex* v. *Beebe* (3) ?]

The warning that was given by the Recorder to the jury in his summing up was adequate.

The judgment of the Court (Lord Hewart C.J., Avory and Salter JJ.) was delivered by

Avory J. Two questions arise for our determination in this case. The first is whether the course taken by the Recorder in calling the prisoner Benton as a witness when the case for the defence had closed was in accordance with the

(1) 62 J. P. 232.

(2) (1859) 1 F. & F. 666.

(3) (1925) 19 Cr. App. R. 22.

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well recognized rule that governs proceedings at criminal trials. The second question is whether, assuming that the witness was properly called, and that there was no irregularity in the manner in which he was called at that stage of the proceedings, the Recorder gave the jury the appropriate warning as to the danger of acting upon the uncorroborated evidence of an accomplice.

As to the first point, it has been clearly laid down by the Court of Appeal in *In re Enoch and Zaretsky, Bock & Co.* (1) that in a civil suit the judge has no right to call a witness not called by either party, unless he does so with the consent of both of the parties. It also appears to be clearly established that that rule does not apply to a criminal trial where the liberty of a subject is at stake and where the sole object of the proceedings is to make certain that justice should be done as between the subject and the State. The cases of *Reg.* v. *Chapman* (2) and *Reg.* v. *Holden* (3) establish the proposition that the presiding judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion this course is necessary in the interests of justice. It is true that in none of the cases has any rule been laid down limiting the point in the proceedings at which the judge may exercise that right. But it is obvious that injustice may be done to an accused person unless some limitation is put upon the exercise of that right, and for the purpose of this case we adopt the rule laid down by Tindal C.J. in *Reg.* v. *Frost* (4), where the Chief Justice said: "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal

(1) [1910] 1 K. B. 327.

(2) 8 C. & P. 558.

(3) 8 C. & P. 606.

(4) 4 St. Tr. (N. S.) 86, 386; 9 C. & P. 129, 159.

case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown." That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the judge after the case for the defence is closed, and that the practice should be limited to a case where a matter arises ex improviso, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue. As great a judge as Bramwell B. said in *Reg.* v. *Haynes* (1), when it was proposed, after witnesses had been called for the defence and counsel had replied on behalf of the prosecution, to call another witness for the prosecution: "It is quite clear that counsel cannot call him, as the cases are closed; and if it were allowed, it would necessitate two more speeches. The only doubt I have is, whether I should examine him, as to which I will consult my brother Crompton." Having done so, he continued: "We are both of opinion that it is better to abide by the general rule, and that it would be inexpedient to allow this fresh evidence to be gone into after the close of the whole case."

In the present case there is a further objection to the course which was adopted by the Recorder in view of the fact that this thief who was invited by the Recorder to give evidence, had been present in Court, in the dock, during the whole of the trial of the appellant. It is obvious that when he was invited by the Recorder to give evidence he would have understood that he was being invited by the Recorder to supplement the case against the appellant, Dora Harris. He was at that time a convicted person who had not been sentenced, and he had everything to expect from doing something which he thought would be pleasing to the judge who had invited him to give evidence. Further, no suggestion seems to have been made that the appellant Harris should go back into the witness box, after Benton had given his evidence, in order to give further evidence

(1) 1 F. & F. 666.

if she so desired, nor was she given any opportunity to contradict the evidence given by Benton.

In the circumstances, without laying down that in no case can an additional witness be called by the judge at the close of the trial after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular, and was calculated to do injustice to the appellant Harris.

Apart from that the question arises whether there was a proper warning given to the jury not to act upon the uncorroborated evidence of Benton, who was an accomplice. As to that the following passage has been read from the summing up to the jury by the Recorder. [His Lordship read the passage from the summing up set out above and continued :] With all respect to the learned Recorder this so called warning appears to us to be defective in the same way as the warning given to the jury in *Rex* v. *Beebe* (1) was defective. Lord Hewart C.J., dealing with the warning which had been given in that case, said this (2) : "Now what has happened here ? First of all, has the warning itself been clearly and sufficiently given ? The important words are : 'So far as that matter is concerned, I tell you that it is generally dangerous to convict on the evidence of an accomplice.' With great respect to the learned judge that is not the warning referred to. That warning may well convey to the minds of the jury that, although as a rule it is dangerous to convict on the evidence of an accomplice, that rule is by no means of universal application, and that there may be cases in which it is quite safe to convict upon the evidence of an accomplice without corroboration, and, by implication, that this case is one of such cases. And then one finds that passage followed by this passage : 'If you are quite satisfied that that girl is telling the truth and nothing but the truth so that you are satisfied in your heart and conscience although it is uncorroborated, you ought to act upon it.' Those words are not only not a warning of the danger of so acting, and not only are they not a refraining

(1) 19 Cr. App. R. 22. (2) 19 Cr. App. R. 26.

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1927

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v.
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HARRIS.

from advising the jury so to act, but they are quite clearly an affirmative and express direction to the jury that in that event they ought so to act. In the opinion of this Court that direction is not such a direction as should, according to the law laid down in *Baskerville's* case (1), be given." The words of that judgment appear exactly to apply to the warning given in the present case, and this Court is of opinion that it was insufficient.

This Court is therefore of opinion that on both grounds this appeal should be allowed, and the conviction must therefore be quashed.

Appeal allowed.
Conviction quashed.

Solicitor for appellant: *John A. Behn, Liverpool.*
Solicitor for Crown: *Town Clerk, Liverpool.*

R. F. S.

CLARK, APPELLANT *v.* WESTAWAY, RESPONDENT.

1927
July 26, 27.

Revenue—Customs and Excise—Betting Duty—Bookmaker carrying on Business without Certificate—Conviction of keeping Betting House—Whether also liable to Penalty under Finance Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 17, *sub-s.* 1 (*b*).

The appellant was convicted under s. 3 of the Betting Act, 1853, of keeping a betting house. Subsequently, he was convicted, in respect of the same matters, under s. 17, sub-s. 1 (*b*), of the Finance Act, 1926, of carrying on business as a bookmaker without having in force a proper certificate:—

Held, that the second conviction was valid since it was not barred by the conviction under the Betting Act, 1853, and since s. 17, sub-s. 1 (*b*), of the Finance Act, 1926, applied to a bookmaker although he carried on his betting business in such circumstances as to commit an offence under the Betting Acts.

CASE stated by justices for the county borough of Bootle.

At a court of summary jurisdiction sitting at Bootle an information was exhibited by the respondent, Clarence Clifton Westaway, one of His Majesty's officers of Customs and

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(1) [1916] 2 K. B. 658, 663.

1927

CLARK
v.
WESTAWAY.

Excise, under the Finance Act, 1926, against the appellant, Arthur Clark, alleging that he, between December 6 and December 19, 1926, at the county borough of Bootle, did carry on business as a bookmaker without having in force a proper certificate, as by s. 15, sub-s. 1 (*b*), of the Finance Act, 1926, was required, whereby, and by s. 17, sub-s. 1 (*b*), of the Act, he was liable in respect of such offence to an excise penalty of 100*l.*

On the hearing of the information it was proved or admitted that on January 5, 1927, the appellant was committed for trial at the then next Liverpool Assizes by justices of the same court of summary jurisdiction, and on February 1, 1927, was convicted before Greer J., for that he, on and between December 7 and 18, 1926, being then the occupier of a certain house and yard at 176 Wadham Road, Bootle, unlawfully did keep or use the said house and yard for the purpose of betting with persons resorting thereto upon certain events or contingencies of or relating to certain horse races and football matches contrary to s. 3 of the Betting Act, 1853. On December 17, 1926, one Richard Henry Benson made a cash bet with the appellant at the premises aforesaid, but received no revenue ticket. On December 18, 1926, Benson made a cash bet with the appellant at the premises, but received no revenue ticket. On various occasions between December 9 and 18, 1926, bets were made by divers persons with the appellant at the premises. On entering the premises on a warrant the police found a large quantity of betting slips and money therein. In November, 1926, the appellant had applied at the Custom House, Liverpool, for a bookmaker's licence for ready-money betting, but the clerk there said: "I can't give you that as a ready-money betting certificate."

On behalf of the appellant it was contended that (1.) the conviction under s. 3 of the Betting Act, 1853, was a bar to a conviction under s. 17 of the Finance Act, 1926; and (2.) s. 17 of the Finance Act, 1926, did not apply to illegal betting. On behalf of the respondent it was contended that: (1.) The conviction under the Betting Act, 1853, was not a bar to a conviction under s. 17 of the Finance Act, 1926; and (2.) s. 17 of the Finance Act, 1926, applied to illegal betting. The attention of the justices was drawn to the following authorities: *Reg.* v. *Miles* (1); Archbold's Pleading, Evidence and Practice in Criminal Cases, 26th ed., pp. 154–163; Interpretation Act, 1889, s. 33; Finance Act, 1926, ss. 15, 17, 18; *Inland Revenue Commissioners* v. *Alexander von Glehn & Co.* (2); *Saunders* v. *Baldy.* (3)

The justices were of opinion that (1.) the conviction under the Betting Act, 1853, was no bar to a conviction under s. 17 of the Finance Act, 1926; and (2.) s. 17 of the Finance Act, 1926, applied to illegal betting. They accordingly convicted the appellant and fined him 25*l.*, or one month's imprisonment.

The appellant being dissatisfied with this decision as being erroneous in point of law, the justices stated this case for the opinion of the Court.

Maxwell Fyfe for the appellant. The Finance Act, 1926, does not render it necessary for a man who carries on a ready-money bookmaker's business to have a bookmaker's licence. The statute only deals with that kind of betting which is not unlawful. By s. 18 it defines "betting premises" as "any premises which are kept or used for the purpose of making . . . . bets on credit"—that is, premises used for lawful betting, and a different meaning cannot be given to betting in ss. 15 and 17 from what is given to betting in s. 18. In the absence of special words extending a taxing statute to illegal businesses there is a presumption that it applies only to lawful businesses. The words in s. 18 defining "bet"—"bet on an event of any kind"—are not sufficient to include an illegal bet, nor does the definition of bookmaker include any person who carries on the business of receiving or negotiating bets, whether legally or illegally. It was held in *Inland Revenue Commissioners* v. *Alexander von Glehn & Co.* (2), that a penalty imposed

(1) (1890) 24 Q. B. D. 423.
(2) [1920] 2 K. B. 553.
(3) (1865) L. R. 1 Q. B. 87.

upon a person or company for a breach of the law committed in trading cannot be deducted as a loss connected with or arising out of the trade or business within the meaning of the Income Tax Acts. Scrutton L.J. in the course of his judgment said (1): "I am inclined to think, though I do not wish finally to decide it, that the Income Tax Acts are to be confined to lawful businesses, and to businesses carried on in a lawful manner." In *Cooper* v. *Stubbs* (2), where the question had regard to the liability to income tax of profits made in dealing in "futures" in cotton, both Warrington and Atkin L.JJ. expressed a doubt whether betting transactions which produced a revenue to the person who engaged in them resulted in profits which were assessable to tax. In any case the appellant would have been entitled to plead autrefois convict to the present charge since "where the same facts would justify a conviction for different offences . . . . a man who has been convicted for one offence cannot be tried over again on the same facts for the second offence": per Sir Richard Couch in *Wentworth* v. *Mathieu*. (3) *Saunders* v. *Baldy* (4) is distinguishable from the present case, because there the second matter with regard to which the appellant was convicted merely related to a forfeiture or penalty with reference to a revenue matter. Sect. 17, sub-s. 1 (*a*), of the Finance Act, 1926, however, creates a definite offence.

Sir Douglas Hogg A.-G. and *Bowstead* for the respondent. The conviction of the appellant was valid since, in taking the bets at the house in question, he was "carrying on business as a bookmaker" within s. 17, sub-s. 1 (*b*), of the Finance Act, 1926. It is not accurate to say that any betting is illegal per se, although the bets made are void and irrecoverable, but betting in certain circumstances—e.g., those indicated by s. 3 of the Betting Act, 1853—constitutes an offence. It is only because premises cannot be used for ready-money betting and because s. 15, sub-s. 2, of the Act provides that nothing in that Part of the Act shall operate to render

(1) [1920] 2 K. B. 572.
(2) [1925] 2 K. B. 753, 769, 776.
(3) [1900] A. C. 212, 216.
(4) L. R. 1 Q. B. 87.

lawful any betting in any manner or place in which it has hitherto been unlawful that the definition in s. 18 of the "betting premises" for which, by s. 15, sub-s. 1 (*c*), a certificate is required is confined to premises "kept or used for the purpose of making, receiving or negotiating in any manner whatsoever bets on credit." But when the Act deals with the other two revenue provisions—namely, the imposition of a duty on bets: s. 15, sub-s. 1 (*a*); and the need to take out a bookmaker's certificate: s. 15, sub-s. 1 (*b*), there is no limitation nor any distinction between ready-money betting and credit betting, because ready-money betting is legal on a racecourse. The Finance Act, 1926, is quite general in its terms. Sect. 15, sub-s. 1 (*a*), refers to a duty on "every bet" made with "a" bookmaker, and in s. 18, sub-s. 1, a bet is defined as "a bet on an event of any kind."

[He was stopped.]

Fyfe replied.

LORD HEWART C.J. The first argument advanced on behalf of the appellant was that his conviction under s. 3 of the Betting Act, 1853, was a bar to a conviction of him under s. 17 of the Finance Act, 1926. It seems to me that that point is disposed of by the provisions of the section itself, for it provides that "if any person—(*b*) carries on business as a bookmaker without having in force a proper certificate . . . . he shall (*without prejudice to his liability to any other penalty* or his liability to pay any sum in respect of duty under this Part of this Act) be liable, in respect of each offence, to an excise penalty of 100*l*." The words which I have emphasized seem to make it clear that the penalty to which a person's conduct may expose him under that section is intended to be cumulative on any penalty to which that conduct may expose him under some other statute. This view is reinforced by the case of *Saunders* v. *Baldy* (1), where it was held that a person using a trap for taking game without a certificate during the prohibited season was liable to a penalty under one section of the Game Act, 1831 (1 & 2 Will. 4, c. 32),

(1) L. R. 1 Q. B. 87.

although he might also be liable to penalties under another section. "I see no reason," said Cockburn C.J. (1), "why a man should not be liable to two penalties for the two offences—one against the laws for preservation of game, and one against the revenue, no matter at what season of the year. I think the respondent was guilty of the offence charged, inasmuch as he used an engine for the purpose of killing game without a certificate." In other words, the question whether the present appellant had been guilty of an offence under s. 3 of the Betting Act, 1853, was wholly distinct from the question whether he had also exposed himself to a penalty under the Finance Act, 1926. There is, therefore, no room here for a plea of autrefois convict.

But what, I think, is the real point in this case was raised by the appellant's contention that s. 17 of the Finance Act, 1926, did not apply to "illegal betting." That phrase, "illegal betting," is so concise as easily to be capable of concealing a fallacy. To say without qualification that some betting is "illegal" might easily convey the impression that the transaction of betting is per se illegal. That is not what is meant by the phrase, which is used to describe betting carried on in such circumstances as that the person who is responsible as owner, occupier, or user of the place where the betting takes place renders himself liable to a penalty under the Betting Act, 1853. The argument advanced on behalf of the appellant really involves the proposition that, if a man contrives to carry on his betting in circumstances which expose him to punishment under the Betting Act, 1853, he is to escape the obligations which are imposed by the Finance Act, 1926. That proposition, when it is plainly stated, is doing what was referred to by Lord Haldane in *Minister of Finance* v. *Smith* (2), when he said, with reference to the enactment under consideration there: "Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong."

(1) L. R. 1 Q. B. 89.

(2) [1927] A. C. 193, 197.

The words of s. 17, sub-s. 1, of the Finance Act, 1926, are quite general and comprehensive. They are "*any* person" who carries on business as a bookmaker. Sect. 18, sub-s. 1, defines bookmaker as "any person" who receives or negotiates bets. In the present case the findings of fact are conclusive that on various dates the appellant acted as a bookmaker without a certificate. It is nothing to the purpose to say that there was a further ingredient in what he did—namely, that he did it in such circumstances as to commit an offence under the Betting Act, 1853. In my opinion, this case comes clearly within the terms of the statute, and to hold otherwise would be to insert in the Finance Act, 1926, a proviso excluding from the operation of the Act persons who happen to bet in such a way and in such a place as to expose themselves to penalties under other statutes. That would be a grotesque conclusion and one not to be arrived at unless the words of the statute clearly compelled it. I think, therefore, that this appeal fails and must be dismissed.

AVORY J. On the first point—that the appellant's conviction under s. 3 of the Betting Act, 1853, was a bar to a conviction under s. 17 of the Finance Act, 1926—I entirely agree with the judgment of my Lord and I have nothing to add.

On the second point the contention on behalf of the appellant is that the words "bet" and "bookmaker" in s. 18 of the Act of 1926 must be construed to mean a bet which is not contrary to law and a bookmaker who carries on business in a manner which is not contrary to law. The Attorney-General has sufficiently answered the point which is made about the word "bet" when he says that there is no such thing as an illegal bet as distinguished from a legal bet. That is very conspicuously supported by two passages in the judgment of Lord Halsbury in *Powell* v. *Kempton Park Racecourse Co.* (1), when he said that this statute of 1853 "prohibits opening a house, &c., for the purpose of the owner or occupier betting with persons resorting to the house so opened. It does not prohibit betting. It does not affect to deal with the betting of people unconnected with the house betting inter se." Later he said (1): "But it is obvious that the Legislature has not prohibited betting at all, but prohibited keeping a house for betting."

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(1) [1899] A. C. 143, 159.

Dealing with the word "bookmaker" in s. 18 of the Finance Act, 1926, I see no ground for limiting it to a bookmaker who carries on his business in a manner which is not in contravention to the law. On the contrary, s. 17, sub-s. 3, appears to me to contemplate that a bookmaker who holds a certificate may yet be convicted under the Betting Act, 1853, because it provides: "Any Court before which a bookmaker is convicted of any offence under this Part of this Act or otherwise in connexion with his business as a bookmaker, may order him to be disqualified for holding a bookmaker's certificate. . . . ." In other words, a person who infringes the provisions of the Act of 1853 may be ordered to be disqualified from holding a bookmaker's certificate under the Act.

For these reasons I agree that the main point in this case also fails.

SALTER J. I agree, and I have nothing to add on either point.

Appeal dismissed.

Solicitors for appellant: *G. J. Lynskey & Son, Liverpool.*
Solicitor for respondent: *Solicitor for Customs and Excise.*

G. F. L. B.

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(1) [1899] A. C. 162.

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